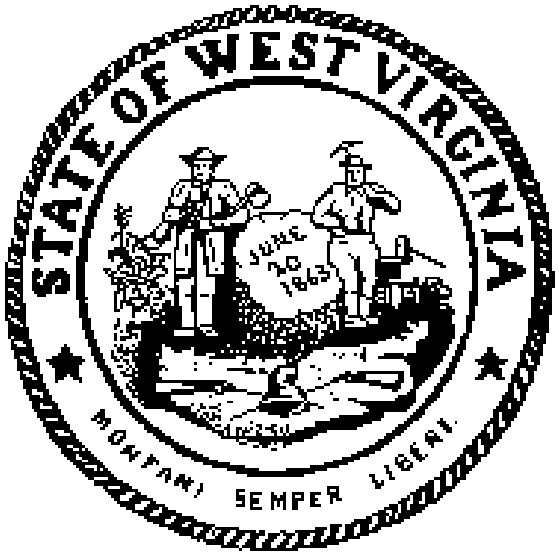
# VOLUME VI
# OF THE
# CRIMINAL LAW DIGEST

**JANUARY 12, 1994 through December 1995**

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## INTRODUCTION

**Criminal Law Digest, Volume VI contains cases issued by the West Virginia Supreme Court of Appeals from January 12, 1994 through December 15, 1995. Indexed in this volume are cases affecting areas in which Public Defender Services is authorized to provide services. I.e., criminal, juvenile, abuse and neglect, paternity, contempt and mental hygiene matters. DUI administrative appeals are applicable criminal matters. This Digest is divided into different topics and is cross-indexed throughout according to the issues discussed by the Court.**

**We attempt to index all relevant cases handed down by the West Virginia Supreme Court within the heretofore mentioned time period. We suggest, however, that if you are relying on a case as authority, you should inquire of the Clerk of the Supreme Court of Appeals whether a petition for rehearing has been filed. These slip opinions are also subject to formal revision before publication.**

**In briefing the cases, we have attempted to be faithful to the language of the Court. We again suggest that the summary of the case not be used as a substitute for a thorough reading of the case.**

**We welcome any comments or suggestions on this material and any ideas you may have regarding future projects for the research center which will assist practitioners. If you detect an error in this publication, please contact Iris R. Brisendine at (304) 558-3905.**

**As an additional aid to assist you with your research using the Criminal Law Digest, the table of contents for Volume I, II, III, IV and V is at the end of Volume VI, each volume is separated with a color sheet.**

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The Department of Health and Human Resources successfully pursued an abuse and neglect petition against Jacqueline and Rick F. resulting in removal of their child from the home and award of temporary custody to DHHR. During the course of several improvement periods and status conferences, Mr. and Mrs. Ihle sought to intervene for the purpose of obtaining permanent guardianship of the child.

Ultimately, DHHR requested permanent custody for purposes of arranging for adoption and Jacqueline F. testified that if she could not retain custody, that Mr. and Mrs. Gorman be given custody. She later executed written consent for them to adopt. At a subsequent hearing on the improvement period, the court ruled that the consent to adopt effectively terminated her parental rights. Rick F. then moved to terminate his parental rights pursuant to *W.Va. Code*, 49-6-7. The court ruled this action vested DHHR with the father's parental rights.

Syl. pt. 1 - *W.Va. Code*, 49-6-5(a)(6), which deals with the disposition by a court of a case involving a neglected or abused child, provides, in part: "No adoption of a child shall take place until all proceedings for termination of parental rights under this article and appeals thereof are final."

Syl. pt. 2 - Where a child abuse and neglect proceeding has been filed against a parent, such parent may not confer any rights on a third party by executing a consent to adopt during the pendency of the proceeding.

Syl. pt. 3 - "In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placements is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact." Syllabus Point 4, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

**ABUSE AND NEGLECT**

**Adoption after filing of charges** (continued)

***Alonzo v. Jacqueline F.***, (continued)

The court viewed the father's action as a consensual termination under *W.Va. Code*, 49-6-7 but chose to view the mother's consent to adopt as governed by *W.Va. Code*, 48-4-3. Custody had already been granted to DHHR prior to the mother's consent to adopt; more critically, *W.Va. Code*, 49-6-5(a)(6) forbids adoption until proceedings for termination have become final.

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***Alonzo v. Jacqueline F.***, 445 S.E.2d 189 (1994) (Miller, J.)

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***In re Elizabeth Jo***, 453 S.E.2d 639 (1994) (Per Curiam)

In June, 1993, a DHHR protective services worker filed a petition pursuant to *W.Va. Code*, 49-6-1 alleging that the three children at issue here were neglected or abused. Finding that the children were in imminent danger, the circuit court ordered the children placed with their maternal grandmother.

Uncontroverted evidence showed a history of neglect and various disturbances, including a suicide attempt by Elizabeth and self-reported sexual activity. All three children ran away from home and two were known to consume alcohol. The family home was found to be unsanitary and unkept. Some evidence of both physical and sexual abuse was introduced. However, the circuit court found DHHR had not met its burden and dismissed the case. This Court granted a stay pending outcome of this appeal.

**ABUSE AND NEGLECT**

**Improvement period** (continued)

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***In re Elizabeth Jo***, (continued)

Syl. pt. 1 - " '*W.Va. Code*, 49-6-2(c) [1980], requires the State Department of Welfare [now the Department of Human Services], in a child abuse or neglect case, to prove "conditions existing at the time of the filing of the petition . . . by clear and convincing proof." The statute, however, does not specify any particular manner or mode of testimony or evidence by which the State Department of Welfare is obligated to meet this burden.' Syllabus Point 1, *In the Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981)." Syllabus Point 1, *West Virginia Department of Human Services v. Peggy F.*, 184 W.Va. 60, 399 S.E.2d 460 (1990).

Syl. pt. 2 - " 'Under *W.Va. Code*, 49-6-2(b) (1984), when an improvement period is authorized, then the court by order shall require the Department of Human Services to prepare a family case plan pursuant to *W.Va. Code*, 49-6D-3 (1984).' Syl. Pt. 3, *State ex rel. West Virginia Dept. of Human Serv. v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987)." Syllabus Point 3, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

Syl. pt. 3 - "In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family." Syllabus Point 4, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

The Court found sufficient evidence to prove the children were neglected (unsanitary condition similar to those in *State v. Carl B.*, 171 W.Va. 774, 301 S.E.2d 864 (1983); additional factors here relating to significant emotional problems). Reversed with directions to allow opportunity for improvement.

**ABUSE AND NEGLECT**

**Improvement period** (continued)

**Case plan required** (continued)

***In the Matter of Brian D. v. Nanny***, 461 S.E.2d 129 (1995) (Workman, J.)

Appellant's parental rights were terminated 6 May 1993. On 8 December 1988 John Nanny, director of attendance for Ohio County schools, filed a petition against appellant pursuant to *W.Va. Code*, 49-6-1, *et seq.*, alleging neglect based on Jeffrey's attendance at kindergarten. A subsequent hearing on 9 December 1988 resulted in psychological evaluations being done on appellant and all four of her children. A status hearing was held 27 January 1989 and another 17 February 1989, resulting in an order to DHHR to file a child protective service report; on 2 June 1989 another hearing resulted in two more delays until 28 September 1989.

On 2 August 1989, however, the court ordered Wilbur White's parental rights terminated, apparently because counsel sought to be relieved from appointment. Wilbur White was reputedly the father, although no abuse charges were ever filed against him. It is not clear whether the 28 September 1989 hearing was held; however, the DHHR worker's report recommended that the "educational neglect" petition be dismissed. Further, the school attendance director suggested an unsupervised improvement period based on improved attendance.

Nearly two years later the DHHR petitioned for custody review; the child had been at St. John's Home for Children since 16 March 1990, allegedly pursuant to order of that date. No court order existed but a juvenile referee directed DHHR to take temporary custody on that date; no permanent placement was mentioned. On 2 August 1991 a hearing was held resulting in a 4 October 1995 order finding the children to be abused, continuing custody at the home but encouraging appellant to visit.

**ABUSE AND NEGLECT**

**Improvement period** (continued)

**Case plan required** (continued)

***In the Matter of Brian D. v. Nanny***, (continued)

For reasons not in the record the attendance officer moved that appellant's rights be terminated on 15 November 1991. Following a hearing on 24 January 1992, the court ruled on 6 March 1992 that appellant's neglect was passive and that she was making progress; custody at St. John's was again continued but home visits were ordered. On 18 May 1992 another hearing resulted in Jeffrey's placement in foster care. On 6 August 1992 the court returned Jeffrey to appellant for a ninety-day home visit. Upon discovery of Wilbur White near appellant's residence, Jeffrey was returned to "whatever facility or foster home (DHHR) deemed to be best...."

By order of 28 January 1993 the court ordered all supervised visitation to cease pending proof that Wilbur White had left the area. Paradoxically, family counseling was ordered, with Mr. White invited to participate. Following transfer of the case to a new judge, a final hearing was held 24 March 1993. A psychologist testified that Jeffrey should continue in foster care; the attendance officer suggested termination (but said he never intended that termination take place); and the DHHR worker agreed Jeffrey should not be returned home.

Jeffrey himself wanted to return home and evidence was offered that he called appellant every night. At the continuation of the hearing on 5 April 1993, the *guardian ad litem* renewed his motion for termination; the prosecution made no recommendation. On 6 May 1993 the court terminated appellant's rights, finding she lacked mental capacity or parenting skills, noting that Wilbur White did not stay away from the family and that termination was in the best interests of the child.

Syl. pt. - "In a child abuse and neglect hearing, before a court can begin to make any of the dispositional alternatives under *W.Va. Code*, 49-6-5, it must hold a hearing under *W.Va. Code* 49-6-2, and determine 'whether such child is abused or neglected.' Such a finding is a prerequisite to further continuation of the case. Syl. Pt. 1, *State v. T.C.*, 172 W.Va. 47, 303 S.E.2d 685 (1983).

**ABUSE AND NEGLECT**

**Improvement period** (continued)

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***In the Matter of Brian D. v. Nanny***, (continued)

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Syl. pt. 3 - "The purpose of the family case plan as set out in *W.Va. Code*, 49-6D-3(a) (1984), is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems." Syl. Pt. 5, *State ex rel. W.Va. Dep't. of Human Servs. v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987).

Syl. pt. 4 - "In formulating the improvement period and family case plans, courts and social service workers should cooperate to provide a workable approach for the resolution of family problems which have prevented the child or children from receiving appropriate care from their parents. The formulation of the improvement period and family case plans should therefore be a consolidated, multi-disciplinary effort among the court system, the parents, attorneys, social service agencies, and any other helping personnel involved in assisting the family." Syl. Pt. 4, *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

Syl. pt. 5 - "Child abuse and neglect cases must be recognized as being among the highest priority for the courts' attention. Unjustified procedural delays wreak havoc on a child's development, stability and security." Syl. Pt. 1, in part, *In re Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

Syl. pt. 6 - "The *guardian ad litem*'s role in abuse and neglect proceedings does not actually cease until such time as the child is placed in a permanent home." Syl. Pt. 5, *James M. v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

**ABUSE AND NEGLECT**

**Improvement period** (continued)

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***In the Matter of Brian D. v. Nanny***, (continued)

Syl. pt. 7 - Cases involving children must be decided not just in the context of competing sets of adults' rights, but also with a regard for the rights of the child(ren).

Syl. pt. 8 - "When the West Virginia Department of Health and Human Resources seeks to terminate parental rights where an absent parent has abandoned the child, allegations of such abandonment should be included in the petition and every effort made to comply with the notice requirements of *W.Va. Code*, 49-6-1 (1992." Syl. Pt. 6, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

Syl. pt. 9 - "In cases where there is a termination of parental rights, the circuit court should consider whether continued association with siblings in other placement is in the child's best interests, and if such continued association is in such child's best interests, the court should enter an appropriate order to preserve the rights of siblings to continued contact." Syl. Pt. 4, *James v. Maynard*, 185 W.Va. 648, 408 S.E.2d 400 (1991).

Syl. pt. 10 - "When parental rights are terminated due to neglect or abuse, the circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would be detrimental to the child's well being and would be in the child's best interest." Syl. Pt. 5, *In re Christina L.*, 194 W.Va. 446, 460 S.E.2d 692 (1995).

The Court was severely critical of the long delays in this case and noted that the various improvement periods were too vague in their goals; a focused plan was recommended. Further, the Court directed that the basis for the alleged father's termination be set forth. Reversed and remanded.

**ABUSE AND NEGLECT**

**Improvement period** (continued)

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Appellant was convicted of being a principal in the second-degree in a first-degree murder. Appellant and his girlfriend were drinking in a bar when another woman entered. The two women began a verbal confrontation, continuing until appellant's girlfriend threw a drink in the face of the victim, a male companion of the other woman.

In the ensuing melee, appellant hit the man while his girlfriend's father stabbed him. Appellant apparently also stabbed the victim with a pocket knife; the body contained other wounds which were from a larger knife, presumably used by the girlfriend's father. The wounds from the larger knife resulted in the victim's death.

Appellant claimed the evidence failed to show that he and the father shared an intent or association, or that the father committed first-degree murder; and that the burden of proof was unconstitutionally shifted.

## AIDING AND ABETTING

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***State v. Mullins***, (continued)

Syl. pt. 1 - " ' "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syl. Pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978)." Syl. Pt. 7, *State v. Knotts*, 187 W.Va. 795, 421 S.E.2d 917 (1992)." Syllabus point 1, *State v. Kirkland*, 191 W.Va. 586, 447 S.E.2d 278 (1994).

Syl. pt. 2 - " 'Where a defendant is convicted of a particular substantive offense, the test of the sufficiency of the evidence to support the conviction necessarily involves consideration of the traditional distinctions between parties to offenses. Thus, a person may be convicted of a crime so long as the evidence demonstrates that he acted as an accessory before the fact, as a principal in the second-degree, or as a principal in the first-degree in the commission of such offense.' Syl. Pt. 8 *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989)." Syllabus point 2, *State v. Kirkland*, 191 W.Va. 586, 447 S.E.2d 278 (1994).

Syl. pt. 3 - "A person who is the absolute perpetrator of a crime is a principal in the first-degree, and a person who is present, aiding and abetting and abetting the fact to be done, is a principal in the second-degree." Syllabus point 5, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).

Syl. pt. 4 - A finding that two criminal actors possess a shared criminal intent does not require that an accused aider and abettor intended to commit the crime committed by the principal in the first-degree. The intent element is relaxed where there is evidence of substantial physical participation in the crime by the accused.

Syl. pt. 5 - Substantial physical participation by a person charged as an aider and abettor in a criminal undertaking constitutes evidence from which a jury may properly infer an intent to assist the principal criminal actor.

## AIDING AND ABETTING

### Principal in first and second-degree defined (continued)

***State v. Mullins***, (continued)

Here, evidence was introduced that appellant said "I'm going to get my licks in too," clearly showing he was aware of the father's attack. Further, a shared criminal intent does not require that the aider and abettor intend to commit the crime committed by the principal in the first-degree. Whether appellant intended to kill the victim is irrelevant; his striking and stabbing of the victim is sufficient to show "substantial physical participation."

The Court also found sufficient evidence to show the principal in the first-degree committed the murder. Finally, the Court found the jury could have inferred malice from the attack itself. No error.

### Witnessing crime

***State v. Mayo***, 443 S.E.2d 236 (1994) (Miller, J.)

Appellant was convicted of second-degree murder, attempted second-degree murder and unlawful wounding. Appellant was asked by a Mr. Berry to accompany him to a store to assist in a dispute over a bill. Mr. Berry asked appellant to get his gun and he, appellant, and another man went to the store.

When they reached the store, the owner's father came out of the store and Mr. Berry yelled "I ain't going to pay you, you white son of a bitch." The father hit Mr. Berry, whereupon Mr. Berry pulled a pistol and shot the owner, fatally wounding him and injuring his son. The car carrying Mr. Berry then drove from the scene.

The son thereupon gave chase, precipitating shots fired from the assailant's car. The son succeeded in pushing the car into a guard rail; all the occupants ran from the vehicle but turned themselves in to authorities the following day. Appellant was charged with aiding and abetting the murder of the father.

**AIDING AND ABETTING**

**Witnessing crime** (continued)

***State v. Mayo***, (continued)

Syl. pt. 1 - " ' "Merely witnessing a crime, without intervention, does not make a person a party to its commission unless his interference was a duty, and his non-interference was one of the conditions of the commission of the crime; or unless his non-interference was designed by him and operated as an encouragement to or protection of the perpetrator." Syllabus, *State v. Patterson*, 109 W.Va. 588, 155 S.E. 661 (1930).' Syllabus Point 3, *State v. Haines*, 156 W.Va. 281, 192 S.E.2d 879 (1992)." Syllabus Point 9, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).

Syl. pt. 2 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syl. Point 1 *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 3 - "The Double Jeopardy Clause of the Federal and this State's Constitutions forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Syllabus Point 4, *State v. Frazier*, 162 W.Va. 602, 252 S.E.2d 39 (1979).

The Court distinguished between a principal in the second-degree (aider and abettor) and an accessory before the fact, noting that the latter is absent from the scene of the crime. Further, mere presence at the scene, even with knowledge of the criminal purpose, is not sufficient to become a principal in the second-degree. *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).

Here, there appeared no common plan to commit the crime. Mr. Berry's acts cannot be attributed to appellant. See also, *State v. Haines*, 156 W.Va. 281, 192 S.E.2d 879 (1972); *State v. Hoselton*, 179 W.Va. 645, 371 S.E.2d 366 (1988) and *Brown v. State*, 250 Ga. 862, 302 S.E.2d 347 (1983). Under double jeopardy principles, the prosecution may not retry appellant. Reversed.

## APPEAL

### Admissibility

#### Reenactment of crime

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Reenactment of crime, (p. 247) for discussion of topic.

### Constitutional error

#### Standard for review

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 544) for discussion of topic.

### Cumulative error

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 544) for discussion of topic.

### *De novo* review

#### Evidence

***Gentry v. Mangum***, 466 S.E.2d 171 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Scientific evidence, (p. 250) for discussion of topic.

**APPEAL**

***De novo* review** (continued)

**Scientific evidence**

***Gentry v. Mangum***, 466 S.E.2d 171 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Scientific evidence, (p. 250) for discussion of topic.

**When applied**

***Chrystal R.M. v. Charlie A.L.***, 459 S.E.2d 415 (1995) (Miller, J.)

See PATERNITY Acknowledgment of in adoption, (p. 491) for discussion of topic.

**Dismissal of**

**Failure to observe appellate rules**

***In the Matter of Lindsey C.***, 473 S.E.2d 110 (1995) (Albright, J.)

See TERMINATION OF PARENTAL RIGHTS Guardian required, (p. 678) for discussion of topic.

**Expert witness**

**Failure to preserve request**

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

See APPOINTED COUNSEL Denial of expert witness, (p. 43) for discussion of topic.

**APPEAL**

**Failure to object**

***State v. Day***, 447 S.E.2d 576 (1994) (Per Curiam)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 617) for discussion of topic.

***State v. Hopkins***, 453 S.E.2d 317 (1994) (Neely, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 602) for discussion of topic.

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

See PROSECUTING ATTORNEYS Conduct at trial, Cross-examination, (p. 550) for discussion of topic.

***State v. Miller***, 459 S.E.2d 114 (1995) (Cleckley, J.)

See INSTRUCTIONS Failure to offer, (p. 382) for discussion of topic.

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing, (p. 549) for discussion of topic.

**Effect of generally**

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

See EVIDENCE Expert witnesses, Admissibility of opinion, (p. 274) for discussion of topic.

**APPEAL**

**Failure to object** (continued)

**Improper order**

***State v. Eddie "Tosh" K.***, 460 S.E.2d 489 (1995) (Per Curiam)

See JUVENILES First offenders, Judge's overreaction to, (p. 438) for discussion of topic.

**Instructions**

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

See INSTRUCTIONS Failure to object, (p. 381) for discussion of topic.

**Motion for expert**

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

See APPOINTED COUNSEL Denial of expert witness, (p. 43) for discussion of topic.

**Reenactment of crime**

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Reenactment of crime, (p. 247) for discussion of topic.

***State v. Day***, 447 S.E.2d 576 (1994) (Per Curiam)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 617) for discussion of topic.

**APPEAL**

**Failure to object** (continued)

**Reenactment of crime** (continued)

***State v. Honaker***, 454 S.E.2d 96 (1994) (Cleckley, J.)

See IMPEACHMENT Preservation of error, (p. 351) for discussion of topic.

**Habeas corpus**

**Distinguished from writ of error**

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

See HABEAS CORPUS Distinguished from appeal, (p. 325) for discussion of topic.

**Ineffective assistance**

**Development on habeas corpus**

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

See INEFFECTIVE ASSISTANCE Habeas corpus, Development on, (p. 366) for discussion of topic.

**Standard for determining**

***State v. Miller***, 459 S.E.2d 114 (1995) (Cleckley, J.)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 374) for discussion of topic.

## APPEAL

### Instructions

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See HOMICIDE Instructions, (p. 336) for discussion of topic.

### Failure to object

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

See INSTRUCTIONS Failure to object, (p. 381) for discussion of topic.

***State v. Miller***, 459 S.E.2d 114 (1995) (Cleckley, J.)

See INSTRUCTIONS Failure to offer, (p. 382) for discussion of topic.

### Failure to offer

***State v. Miller***, 459 S.E.2d 114 (1995) (Cleckley, J.)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 374) for discussion of topic.

***State v. Miller***, 459 S.E.2d 114 (1995) (Cleckley, J.)

See INSTRUCTIONS Failure to offer, (p. 382) for discussion of topic.

### Judge's participation in plea bargain

***State ex rel. Brewer v. Starcher***, 465 S.E.2d 185 (1995) (Cleckley, J.)

See PLEA BARGAIN Acceptance of, Rules governing, (p. 506) for discussion of topic.

## APPEAL

### Magistrate court

#### No trial *de novo* following

***State ex rel. Collins v. Bedell***, 460 S.E.2d 636 (1995) (McHugh, C.J.) (consolidated) ***State ex rel. Peeples v. Knight***, 460 S.E.2d 636 (1995) (McHugh, C.J.)

See MAGISTRATE COURT Appeal from, (p. 454) for discussion of topic.

### Moot questions

***State v. Eddie "Tosh" K.***, 460 S.E.2d 489 (1995) (Per Curiam)

See JUVENILES First offenders, Judge's overreaction to, (p. 438) for discussion of topic.

### Plain error defined

***State v. Wood***, 460 S.E.2d 771 (1995) (McHugh, C.J.)

See EVIDENCE Witnesses, Reputation for truthfulness, (p. 292) for discussion of topic.

### Right to fair trial

#### Procedure for appeal

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

See HABEAS CORPUS Distinguished from appeal, (p. 325) for discussion of topic.

## APPEAL

### Rules

#### Necessity for observing on appeal

***In the Matter of Lindsey C.***, 473 S.E.2d 110 (1995) (Albright, J.)

See TERMINATION OF PARENTAL RIGHTS Guardian required, (p. 678) for discussion of topic.

### Scientific evidence

#### Reviewed *de novo*

***Gentry v. Mangum***, 466 S.E.2d 171 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Scientific evidence, (p. 250) for discussion of topic.

### Sentencing

***Ronnie R. v. Trent***, 460 S.E.2d 499 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 367) for discussion of topic.

***State v. Woods***, 460 S.E.2d 65 (1995) (Per Curiam)

See PROPORTIONALITY Appropriateness of sentence, Generally, (p. 539) for discussion of topic.

#### Proportionality

***State v. Farr***, 456 S.E.2d 199 (1995) (Per Curiam)

See PROPORTIONALITY Appropriateness of sentence, Generally, (p. 539) for discussion of topic.

**APPEAL**

**Setting aside verdict**

**Sufficiency of evidence for**

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See APPEAL Sufficiency of evidence, Generally, (p. 39) for discussion of topic.

**Standard for review**

**Admissibility of evidence**

***State v. Jameson***, 461 S.E.2d 67 (1995) (Per Curiam)

See EVIDENCE Opinion of lay witness, Sufficient foundation for, (p. 284) for discussion of topic.

**Cumulative error**

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 544) for discussion of topic.

**Directed verdict**

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

See HOMICIDE Corpus delicti, Proof of, (p. 333) for discussion of topic.

**APPEAL**

**Standard for review** (continued)

**Discovery**

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

See DISCOVERY Failure to comply, When prejudicial, (p. 175) for discussion of topic.

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

See DISCOVERY Failure to disclose, Witnesses, (p. 177) for discussion of topic.

**Due process violations**

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 544) for discussion of topic.

**Generally**

***State v. Kirkland***, 447 S.E.2d 278 (1994) (Workman, J.)

See SUFFICIENCY OF EVIDENCE Generally, (p. 663) for discussion of topic.

**Indictment**

***Ronnie R. v. Trent***, 460 S.E.2d 499 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 367) for discussion of topic.

**APPEAL**

**Standard for review** (continued)

**Ineffective assistance**

***Ronnie R. v. Trent***, 460 S.E.2d 499 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 367) for discussion of topic.

**Instructions**

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See HOMICIDE Instructions, (p. 336) for discussion of topic.

**Judgment notwithstanding the verdict**

***Mildred L.M. v. John O.F.***, 452 S.E.2d 436 (1994) (Cleckley, J.)

See PATERNITY Blood tests, When conclusive, (p. 492) for discussion of topic.

**Moot questions**

***State v. Eddie "Tosh" K.***, 460 S.E.2d 489 (1995) (Per Curiam)

See JUVENILES First offenders, Judge's overreaction to, (p. 438) for discussion of topic.

**Plea bargains**

***State ex rel. Brewer v. Starcher***, 465 S.E.2d 185 (1995) (Cleckley, J.)

See PLEA BARGAIN Acceptance of, Rules governing, (p. 506) for discussion of topic.

**APPEAL**

**Standard for review** (continued)

**Sentencing**

***Ronnie R. v. Trent***, 460 S.E.2d 499 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 367) for discussion of topic.

***State v. Eddie "Tosh" K.***, 460 S.E.2d 489 (1995) (Per Curiam)

See JUVENILES First offenders, Judge's overreaction to, (p. 438) for discussion of topic.

***State v. Farr***, 456 S.E.2d 199 (1995) (Per Curiam)

See PROPORTIONALITY Appropriateness of sentence, Generally, (p. 539) for discussion of topic.

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

See SENTENCING Appeal of, Standard for review, (p. 611) for discussion of topic.

***State v. Woods***, 460 S.E.2d 65 (1995) (Per Curiam)

See PROPORTIONALITY Appropriateness of sentence, Generally, (p. 539) for discussion of topic.

**Sequestration order violated**

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See WITNESSES Sequestration, Violation of, (p. 714) for discussion of topic.

**APPEAL**

**Standard for review** (continued)

**Setting aside verdict**

***Mildred L.M. v. John O.F.***, 452 S.E.2d 436 (1994) (Cleckley, J.)

See PATERNITY Blood tests, When conclusive, (p. 492) for discussion of topic.

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 544) for discussion of topic.

***State v. Hottinger***, 461 S.E.2d 462 (1995) (Per Curiam)

See PROSECUTING ATTORNEYS Duty, Generally, (p. 553) for discussion of topic.

***State v. Mayo***, 443 S.E.2d 236 (1994) (Miller, J.)

See AIDING AND ABETTING Witnessing crime, (p. 22) for discussion of topic.

***State v. Phalen***, 452 S.E.2d 70 (1994) (McHugh, J.)

See FORGERY Elements of, (p. 310) for discussion of topic.

**Sufficiency of circumstantial evidence**

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See EVIDENCE Circumstantial, Sufficiency of, (p. 266) for discussion of topic.

**APPEAL**

**Standard for review** (continued)

**Sufficiency of evidence**

***State v. Deem***, 456 S.E.2d 22 (1995) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Presence at crime scene, Effect of, (p. 669) for discussion of topic.

***State v. Eddie "Tosh" K.***, 460 S.E.2d 489 (1995) (Per Curiam)

See JUVENILES First offenders, Judge's overreaction to, (p. 438) for discussion of topic.

***State v. Farmer***, 445 S.E.2d 759 (1994) (Per Curiam)

See WITNESSES Co-defendant, (p. 709) for discussion of topic.

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See APPEAL Sufficiency of evidence, Generally, (p. 39) for discussion of topic.

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

See HOMICIDE Sufficiency of evidence, (p. 344) for discussion of topic.

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

See SEXUAL ATTACKS Sexual assault, Sufficiency of evidence, (p. 642) for discussion of topic.

**APPEAL**

**Standard for review** (continued)

**Sufficiency of evidence** (continued)

***State v. Mullins***, 456 S.E.2d 42 (1995) (Fox, J.)

See AIDING AND ABETTING Principal in first and second-degree defined, (p. 20) for discussion of topic.

***State v. Walls***, 445 S.E.2d 515 (1994) (Per Curiam)

See INSANITY Presumptions, (p. 377) for discussion of topic.

**Standard for reviewing confessions**

***State v. Jameson***, 461 S.E.2d 67 (1995) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 603) for discussion of topic.

**Standard of proof**

**Criminal cases generally**

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See APPEAL Sufficiency of evidence, Generally, (p. 39) for discussion of topic.

## APPEAL

### Sufficiency of evidence

#### Generally

***State v. Eddie "Tosh" K.***, 460 S.E.2d 489 (1995) (Per Curiam)

See JUVENILES First offenders, Judge's overreaction to, (p. 438) for discussion of topic.

***State v. Farmer***, 445 S.E.2d 759 (1994) (Per Curiam)

See WITNESSES Co-defendant, (p. 709) for discussion of topic.

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See APPEAL Sufficiency of evidence, Generally, (p. 39) for discussion of topic.

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

Appellant was convicted of first-degree murder of a co-worker. It was undisputed that appellant removed a knife from his pocket and fatally stabbed the victim. Appellant suffered from panic attacks, chronic depression and borderline personality disorder. He was obsessed with his nose; the victim had struck appellant in the nose several times before appellant retaliated.

Appellant testified that he suffered a panic attack immediately prior to the stabbing. Appellant was unable to understand his own reaction to the incident. Other workers present testified that the victim was simply "playing around." Appellant unsuccessfully moved for directed verdict for lack of evidence of malice or premeditation.

**APPEAL**

**Sufficiency of evidence** (continued)

**Generally** (continued)

***State v. Guthrie***, (continued)

Syl. pt. 1 - The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after reviewing the evidence in the light most favorable to the prosecution, an rationale trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt.

Syl. pt. 2 - There should be only one standard of proof in criminal cases and that is proof beyond a reasonable doubt. Once a proper instruction is given advising the jury as to the State's heavy burden under the guilt beyond a reasonable doubt standard, an additional instruction on circumstantial evidence is no longer required even if the State relies wholly on circumstantial evidence.

Syl. pt. 3 - A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not for an appellate court. Finally, a jury verdict should be set aside only when the records contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled.

The Court reconciled West Virginia law, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978), with federal, *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Under *Jackson* the Court must accept the jury's decision; an appellate court may reverse only if no rational jury could have found appellant guilty. The evidence is to be viewed most favorably for the prosecution.

**APPEAL**

**Sufficiency of evidence** (continued)

**Generally** (continued)

***State v. Guthrie***, (continued)

The Court reversed the rule requiring the prosecution to exclude all other reasonable hypotheses to convict where it relies on circumstantial evidence, *State v. Frasher*, 164 W.Va. 572, 265 S.E.2d 43 (1980), and adopted *Holland v. United States*, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954), which allows for instructions in circumstantial evidence cases to rest on reasonable doubt. There is no need for excluding every other reasonable hypothesis. The jury is to weigh circumstantial evidence as it does any other evidence.

The Court stated clearly that an appellate court should not substitute its judgement for that of the finder of fact; further that a conviction should be set aside only when the record contains no evidence from which a guilty verdict could be rendered. See *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978). Here, the jury could easily have found both malice and pre-meditation. No error.

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

See SEXUAL ATTACKS Sexual assault, Sufficiency of evidence, (p. 642) for discussion of topic.

***State v. Walls***, 445 S.E.2d 515 (1994) (Per Curiam)

See INSANITY Presumptions, (p. 377) for discussion of topic.

**Standard for review**

***State v. Deem***, 456 S.E.2d 22 (1995) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Presence at crime scene, Effect of, (p. 669) for discussion of topic.

**APPEAL**

**Sufficiency of evidence** (continued)

**To withstand judgment**

***Mildred L.M. v. John O.F.***, 452 S.E.2d 436 (1994) (Cleckley, J.)

See PATERNITY Blood tests, When conclusive, (p. 492) for discussion of topic.

**Waiver of error**

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

See INSTRUCTIONS Failure to object, (p. 381) for discussion of topic.

## APPOINTED COUNSEL

### Denial of expert witness

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

Appellant was convicted of first-degree murder. Fifteen months prior to trial he requested leave to hire a forensic pathologist. Although the motion was never granted, trial counsel did not renew his request.

Syl. pt. 7 - " ' "This Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance." Syllabus Point 2, *Sands v. Security Trust Co.*, 143 W.Va. 522, 102 S.E.2d 733 (1958).' Syl. pt. 2, *Duquesne Light Co. v. State Tax Dept.*, 174 W.Va. 506, 327 S.E.2d 683 (1984), *cert. denied*, 471 U.S. 1029, 105 S.Ct. 2040, 85 L.Ed.2d 322 (1985)." Syl. pt. 2, *Crain v. Lightner*, 178 W.Va. 765, 364 S.E.2d 778 (1987).

Finding no preservation in the record the Court refused to rule.

### Duty to represent

***State ex rel. Rock v. Parsons***, No. 23103 (12/8/95) (Per Curiam)

Petitioner was incarcerated in the South Central Regional Jail when he filed this petition for habeas corpus pro se. Petitioner was convicted of two counts of daytime burglary, entering without breaking, *W.Va. Code*, 61-3-11, and sentenced to one to ten on each, terms to run consecutively.

In May 1995, petitioner's court-appointed counsel filed a motion to reconsider under Rule 35, which motion was denied May 16, 1995. No notice of intent to appeal was filed.

The Court found that trial counsel is required to pursue an appeal unless an order is entered relieving him. *State v. Merritt*, 188 W.Va. 601, 396 S.E.2d 871 (1990). He cannot simply inform his client that an appeal is frivolous; an appellate court must make that determination. *Turner v. Haynes*, 162 W.Va. 33, 245 S.E.2d 629 (1973). Remanded for consideration of appeal. Writ granted.

## APPOINTED COUNSEL

### Municipal offenses

***State ex rel. Kees v. Sanders***, 453 S.E.2d 436 (1994) (McHugh, J.)

Petitioner sought to prohibit respondent judge from enforcing an order denying petitioner's motion to remand a traffic offense to municipal court for new trial with court-appointed counsel. Petitioner was cited for running a stop sign in violation of a municipal ordinance. The penalty for this offense was either a fine, or jail time, or both.

Petitioner sought court-appointed counsel, indicating a gross monthly income of $634.00 from disability benefits. He stated he had not tried to obtain private counsel, nor did he intend to do so. The judge refused and petitioner was found guilty and fined $97.00. Upon appeal to circuit court, counsel was appointed but the request for remand to municipal court denied.

Syl. pt. 1 - In a municipal court proceeding on a minor traffic offense, where a judge states, in advance of the proceeding, that notwithstanding the applicable provision which permits a jail sentence, the judge will under no condition impose one nor impose a fine so onerous that the defendant cannot pay it thereby subjecting him to a contempt charge which may result in a jail sentence, then appointment of counsel pursuant to *W.Va. Code*, 29-21-2(2) [1990] is not required.

Syl. pt. 2 - "A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W.Va. Code*, 53-1-1." Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977).

The Court found the primary issue to be whether petitioner had a statutory right to court-appointed counsel. Constitutional right to counsel was not implicated because imprisonment was not actually imposed. *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

**APPOINTED COUNSEL**

**Municipal offenses** (continued)

***State ex rel. Kees v. Sanders***, (continued)

Under *Champ v. McGhee*, 165 W.Va. 567, 270 S.E.2d 445 (1980), if a judge states before trial that no prison sentence will be imposed, the trial may proceed without a jury. The Court applied the same reasoning here, despite the lack of a record as to whether the municipal judge had announced that no jail term would be imposed; the actual fine was held sufficient. Since on appeal to circuit court, petitioner cannot receive a stiffer penalty than imposed below, no right to appointed counsel in circuit court either. No lack of jurisdiction to refuse remand with counsel. Writ denied.

**Refusal of**

***City of Bluefield v. Williams***, 456 S.E.2d 548 (1995) (Per Curiam)

See RIGHT TO COUNSEL Waiver must be knowing, (p. 573) for discussion of topic.

**Waiver of**

***City of Bluefield v. Williams***, 456 S.E.2d 548 (1995) (Per Curiam)

See RIGHT TO COUNSEL Waiver must be knowing, (p. 573) for discussion of topic.

## ARREST

### Citizen's arrest

***State v. Farmer***, 454 S.E.2d 378 (1994) (McHugh, J.)

Appellant was convicted of joyriding and kidnaping. At the request of the local municipal police, he was arrested by a retired deputy sheriff who seized from him a gun, ammunition and a knife. Appellant claimed on appeal that all evidence obtained pursuant to the arrest should have been excluded.

The Court noted that an illegal arrest does not of itself void a conviction, Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure*, I-182 (2d Ed. 1993), but can result in exclusion of evidence. *Cleckley*, *supra* at 1-184.

Here, the Court found sufficient evidence to convict even if the arrest were illegal and the retired deputy's testimony excluded. The Fourth Amendment is inapplicable since the retired deputy was not an agent of the state; only his testimony would have been excluded, not the fruits of the arrest.

If any error occurred, it was harmless. Syl. pt. 3, "Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction." Syl. pt. 20, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

### Misdemeanor

#### In presence of police officer

***State v. Forsythe***, 460 S.E.2d 742 (1995) (Per Curiam)

Appellant was convicted of obstructing an officer. Appellant was charged with assault on his wife and obstructing. On appeal he alleges the officer did not personally observe him swing his fist at his wife. Therefore, since the underlying misdemeanor offense was not committed in the officer's presence, no basis for the arrest existed and he could not be guilty of obstructing an officer.

**ARREST**

**Misdemeanor** (continued)

**In presence of police officer** (continued)

***State v. Forsythe***, (continued)

Syl. pt. 1 - "Probable cause to make a misdemeanor arrest without a warrant exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to warrant a prudent man in believing that a misdemeanor is being committed in his presence." Syllabus, *Simon v. Department of Motor Vehicles*, 181 W.Va. 267, 382 S.E.2d 320 (1989).

Syl. pt. 2 - "An offense can be said to be committed in the presence of an officer only when he sees it with his own eyes, or sees one or more of a series of acts constituting [the] offense, and is aided by his other senses or by information as to the others, when it may be said the offense was committed in his presence." Syl. pt. 9, *State v. Lutz*, 85 W.Va. 330, 101 S.E. 434 (1919).

All parts of the offense need not be seen by the officer. Cleckley, *Handbook on West Virginia Criminal Procedure*, I-170-71 (2d Ed. 1993). The officer here observed both appellant and his wife in an agitated state and heard appellant's threats and a sound made by appellant's fist striking a wall. He also observed appellant's wife jerk back from the wall. (The Court also noted the arrest was made pursuant to *W.Va. Code*, 61-2-9, not 61-2-28 or 48-2A-14, which specifically address domestic violence and which have far lower probable cause standards.) No error.

**When occurs**

***State v. Jones***, 456 S.E.2d 459 (1995) (Cleckley, J.)

See SELF-INCRIMINATION Statements by defendant, (p. 594) for discussion of topic.

## ASSAULT

### Sufficiency of evidence

***State v. Kirkland***, 447 S.E.2d 278 (1994) (Workman, J.)

See SUFFICIENCY OF EVIDENCE Generally, (p. 663) for discussion of topic.

## ATTEMPT

### Defined

*State v. Mayo*, 443 S.E.2d 236 (1994) (Miller, J.)

See HOMICIDE  Attempted murder, (p. 332) for discussion of topic.

## ATTORNEY-CLIENT PRIVILEGE

### Crime/fraud exception

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

Appellant was convicted of murder. One of the witnesses was represented by an attorney; he stated several times in her presence that he was not present when the murder occurred and knew nothing. When his attorney was not present the witness changed his story. The attorney withdrew. Appellant's request was denied for an *in camera* hearing concerning whether the crime/fraud exception applied. See *United States v. Zolin*, 491 U.S. 554 (1989).

The Court noted that the evidence here did not suggest that any communications took place in furtherance of a future crime. At most, it seemed to suggest that the witness may have been intimidated by police into changing his story. The trial court was within its discretion in refusing an *in camera* hearing. No error.

### Testimony before grand jury

***State ex rel. Doe v. Troisi***, 459 S.E.2d 139 (1995) (Cleckley, J.)

See SUBPOENAS Attorney-client privilege, When effective against, (p. 660) for discussion of topic.

## ATTORNEYS

### Annulment

***Committee on Legal Ethics v. Goodman***, 441 S.E.2d 382 (1994) (Per Curiam)

See ATTORNEYS Discipline, Misconduct in another jurisdiction, (p. 82) for discussion of topic.

***Committee on Legal Ethics v. Martin***, No. 20859 (2/18/94) (Per Curiam)

See ATTORNEYS Discipline, Failure to follow reinstatement plan, (p. 74) for discussion of topic.

***Committee on Legal Ethics v. ReBrook***, No. 21975 (2/18/94) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 67) for discussion of topic.

***State v. Sloan***, 442 S.E.2d 724 (1994) (Per Curiam)

See ATTORNEYS Discipline, Commission of crime, (p. 61) for discussion of topic.

### Aggravating factors

***Lawyer Disciplinary Board v. Taylor***, 451 S.E.2d 440 (1994) (Per Curiam)

See ATTORNEYS Discipline, Annulment, (p. 55) for discussion of topic.

### Conviction of crimes

***Committee on Legal Ethics v. Sydnor***, 450 S.E.2d 638 (1994) (Per Curiam)

See ATTORNEYS Discipline, Commission of crime, (p. 60) for discussion of topic.

**ATTORNEYS**

**Annulment** (continued)

**Prior discipline**

***Lawyer Disciplinary Board v. Taylor***, 451 S.E.2d 440 (1994) (Per Curiam)

See ATTORNEYS Discipline, Annulment, (p. 55) for discussion of topic.

**Reinstatement following**

***Committee on Legal Ethics v. Berzito***, No. 22201 (7/15/94) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 94) for discussion of topic.

**Appointed**

**Duty to client**

***State ex rel. Rock v. Parsons***, No. 23103 (12/8/95) (Per Curiam)

See APPOINTED COUNSEL Duty to represent, (p. 43) for discussion of topic.

**Attorney-client privilege**

**Crime-fraud exception**

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See ATTORNEY-CLIENT PRIVILEGE Crime/fraud exception, (p. 50) for discussion of topic.

**ATTORNEYS**

**Bankruptcy court suspension**

**Effect of**

***Lawyer Disciplinary Board v. Kohout***, No. 22629 (4/14/95) (Per Curiam)

See ATTORNEYS Discipline, Misrepresentation on bar application, (p. 84) for discussion of topic.

**Conflict of interest**

**Divorce action**

***Lawyer Disciplinary Board v. Printz***, 452 S.E.2d 720 (1994) (Per Curiam)

See ATTORNEYS Discipline, Conflict of interest, (p. 62) for discussion of topic.

**Estates**

***Lawyer Disciplinary Board v. Simons***, No. 22442 (12/15/94) (Per Curiam)

See ATTORNEYS Discipline, Conflict of interest, (p. 64) for discussion of topic.

**Powers of attorney**

***Lawyer Disciplinary Board v. Simons***, No. 22442 (12/15/94) (Per Curiam)

See ATTORNEYS Discipline, Conflict of interest, (p. 64) for discussion of topic.

**ATTORNEYS**

**Conflict of interest** (continued)

**Prior representation of opposing party in related matters**

***Lawyer Disciplinary Board v. Printz***, 452 S.E.2d 720 (1994) (Per Curiam)

See ATTORNEYS Discipline, Conflict of interest, (p. 62) for discussion of topic.

**Conviction of crimes**

***Committee on Legal Ethics v. Sydnor***, 450 S.E.2d 638 (1994) (Per Curiam)

See ATTORNEYS Discipline, Commission of crime, (p. 60) for discussion of topic.

**Disbarment**

***Committee on Legal Ethics v. Goodman***, 441 S.E.2d 382 (1994) (Per Curiam)

See ATTORNEYS Discipline, Misconduct in another jurisdiction, (p. 82) for discussion of topic.

***Committee on Legal Ethics v. Martin***, No. 20859 (2/18/94) (Per Curiam)

See ATTORNEYS Discipline, Failure to follow reinstatement plan, (p. 74) for discussion of topic.

***Committee on Legal Ethics v. ReBrook***, No. 21975 (2/18/94) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 67) for discussion of topic.

**ATTORNEYS**

**Disbarment** (continued)

***State v. Sloan***, 442 S.E.2d 724 (1994) (Per Curiam)

See ATTORNEYS Discipline, Commission of crime, (p. 61) for discussion of topic.

**Discipline**

**Aggravating factors**

***Lawyer Disciplinary Board v. Taylor***, 451 S.E.2d 440 (1994) (Per Curiam)

See ATTORNEYS Discipline, Annulment, (p. 55) for discussion of topic.

**Annulment**

***Committee on Legal Ethics v. Keenan***, 450 S.E.2d 787 (1994) McHugh, J.)

See ATTORNEYS Discipline, Failure to comply with terms of, (p. 71) for discussion of topic.

***Committee on Legal Ethics v. Sydnor***, 450 S.E.2d 638 (1994) (Per Curiam)

See ATTORNEYS Discipline, Commission of crime, (p. 60) for discussion of topic.

***Lawyer Disciplinary Board v. Taylor***, 451 S.E.2d 440 (1994) (Per Curiam)

Respondent was charged in two previous disciplinary matters, *Committee on Legal Ethics v. Taylor*, 187 W.Va. 39, 415 S.E.2d 280 (1992); *Committee on Legal Ethics v. Taylor*, 190 W.Va. 133, 437 S.E.2d 443 (1993), in which he was publicly reprimanded for writing worthless checks; and was suspended for two consecutive six-month periods for practicing law knowing his license was suspended for failure to keep current on his continuing education, and for writing a worthless check and failing to make restitution.

**ATTORNEYS**

**Discipline** (continued)

**Annulment** (continued)

***Lawyer Disciplinary Board v. Taylor***, (continued)

Respondent also made blatant misrepresentations to the Court concerning his payment of the previous matters.

Upon respondent's failure to participate in these matters involving similar charges of worthless checks (*W.Va. Code*, 61-3-39), the statement of charges was admitted before the Committee pursuant to *Committee on Legal Ethics v. Martin*, 187 W.Va. 340, 419 S.E.2d 4 (1992). Respondent did not participate in the two prior disciplinary actions cited above, and did not reimburse the Board for the costs therein; similarly, he did not respond to the findings of fact and conclusions of law in this proceeding in which the Board recommended annulment.

Syl. pt. 1 - " ' "In a court proceeding initiated by the Committee on Legal Ethics of the West Virginia State Bar to annul the license of an attorney to practice law, the burden is on the Committee to prove, by full, preponderating and clear evidence, the charges contained in the Committee's complaint." Syl. Pt. 1, *Committee on Legal Ethics v. Pence*, W.Va., 216 S.E.2d 236 (1975).' Syllabus Point 1, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987)." Syl. pt. 1, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).

Syl. pt. 2 - "In order to expedite the investigation of an ethics complaint by the Bar, an attorney's failure to respond to a request for information concerning allegations of ethical violations within a reasonable time will constitute an admission to those allegations for the purposes of the disciplinary proceeding." Syl. pt. 2, *Committee on Legal Ethics v. Martin*, 187 W.Va. 340, 419 S.E.2d 4 (1992).

Syl. pt. 3 - "Prior discipline is a aggravating factor in a pending disciplinary proceeding because it calls into question the fitness of the attorney to continue to practice a profession imbued with a public trust.' Syl. pt. 5, *Committee on Legal Ethics v. Tatterson*, 177 W.Va. 356, 352 S.E.2d 107 (1986)." Syl. pt. 2, *Committee on Legal Ethics v. Taylor*, 190 W.Va. 133, 437 S.E.2d 443 (1993).

## ATTORNEYS

### Discipline (continued)

#### Annulment (continued)

***Lawyer Disciplinary Board v. Taylor***, (continued)

The Court found respondent had committed a criminal act and had lied to the Court. Combined with prior disciplinary actions and respondent's failure to abide by the sanctions therein, the Court found respondent has demonstrated a pattern of ignoring the ethical standards necessary to practice law. Annulment, with reinstatement petition allowed only after restitution made to all persons involved.

#### Attorney/client relationship

***Lawyer Disciplinary Board v. McGraw***, 461 S.E.2d 850 (1995) (McHugh, C.J.)

Respondent, Attorney General of West Virginia, through his assistants, brought two declaratory judgment actions on behalf of the Department of Environmental Protection involving a landfill located in Berkeley County. The purpose was to prohibit the company from accepting waste until the site was approved by the Berkeley County Solid Waste Authority; and to restrict the amount of the tonnage accepted unless Berkeley County approved a larger amount. Motion for summary judgment was granted.

Counsel for the landfill company requested a meeting with DEP officials, which meeting occurred without Attorney General lawyers present. The Director testified that he did not call the Attorney General's staff because he understood the meeting was to discuss sale of the landfill not litigation. At the meeting landfill counsel advised DEP officials that a motion to reconsider had been filed. The AG lawyer assigned was contacted after the meeting and allegedly told to join in the motion. Both the Director and Deputy Director claimed they did not direct counsel to join the motion. The Hearing Panel concluded that the AG lawyer's assumption that DEP had changed its position on the landfill was reasonable.

**ATTORNEYS**

**Discipline** (continued)

**Attorney/client relationship** (continued)

***Lawyer Disciplinary Board v. McGraw***, (continued)

Respondent thereupon determined that the Office of Attorney General could no longer represent the DEP. Respondent then contacted a resident of Berkeley County, Christina Hogbin, whose husband was on the Solid Waste Authority and who lived close to the proposed site, and recommended political pressure against the DEP. Respondent later testified that he did not remember this response but that if he did so respond he had every right to do so. (Respondent's written responses characterize Ms. Hogbin as an intervenor but she was not; respondent claimed no confidential information was given to Ms. Hogbin but she testified that he told her a "closed-door meeting" was held.)

Respondent claimed he called Ms. Hogbin to verify that DEP had changed its position on local site approval. He claimed it was his policy to communicate with clients only in writing and that he had a public document directing him to "do certain things." No document from DEP was ever offered.

At a subsequent meeting with the Director of DEP, respondent informed him that the case of *Manchin v. Browning*, 170 W.Va. 779, 296 S.E.2d 909 (1982) needed "revisiting" and that respondent's calling to the public was higher than his duty to the DEP. In response to respondent's questions, the Director said DEP had not taken a position on the landfill.

Another assistant attorney general later informed the Director that he intended to oppose the motion for reconsideration filed by the landfill company. The Director asked that the motion not be filed. The attorney sent a memo to the AG management committee noting that a good faith defense of DEP's position supporting the company's motion could be filed but further stating a special assistant attorney general should be appointed because of attorney-client conflicts.

**ATTORNEYS**

**Discipline** (continued)

**Attorney/client relationship** (continued)

***Lawyer Disciplinary Board v. McGraw***, (continued)

Five days before the hearing on the motion to reconsider, DEP's Deputy Director learned that respondent intended to withdraw as counsel; she offered to explain the DEP's legal position and asked to be appointed special assistant but was denied by respondent. The next day, without the Director's consent, respondent's assistant AG filed motions to withdraw, attaching a draft memo written by the Deputy Director which had been neither seen nor approved by the Director. Respondent appointed a prosecuting attorney without any experience in this area. The Circuit Court denied respondent's motion to withdraw and the Director filed this complaint.

Disciplinary Counsel charged violations of Rule 1.6(a), revealing confidential client information; Rule 1.7(b), conflict of interest with client; and Rule 1.2(a), failure to abide by the client's wishes. The Hearing Panel found violation of only Rule 1.6(a).

Syl. pt. 1 - Rule 3.7 of the Rules of Lawyer Disciplinary Procedure, effective July 1, 1994, requires the Office of Disciplinary Counsel to prove the allegations of the formal charge by clear and convincing evidence. Prior cases which required that ethics charges be proved by full, preponderating and clear evidence are hereby clarified.

Syl. pt. 3 - Unlike the evidentiary attorney-client privilege recognized under *West Virginia Rules of Evidence* 501, a lawyer's ethical duty of confidentiality under Rule 1.6 of the *Rules of Professional Conduct* applies to all information relating to representation of a client, protecting more than just "confidences" or "secrets" of a client. The ethical duty of confidentiality is not nullified by the fact that the information is part of a public record or by the fact that someone else is privy to it.

Syl. pt. 4 - "The Attorney General has the duty to conform his conduct to that prescribed by the rules of professional ethics." Syl. pt. 4, *Manchin v. Browning*, 170 W.Va. 779, 296 S.E.2d 909 (1982).

**ATTORNEYS**

**Discipline** (continued)

**Attorney/client relationship** (continued)

***Lawyer Disciplinary Board v. McGraw***, (continued)

Syl. pt. 5 - " ' " 'This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorney's licenses to practice law.' Syl. Point 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984)." Syl. pt. 1, *Committee on Legal Ethics v. Charonis*, 184 W.Va. 268, 400 S.E.2d 276 (1990).' Syl. pt. 1, *Committee on Legal Ethics v. Ikner*, 190 W.Va. 433, 438 S.E.2d 613 (1993)." Syl. pt. 7, *Committee on Legal Ethics v. Karl*, 192 W.Va. 23, 449 S.E.2d 277 (1994).

The Court observed that the Attorney General is required to conform to the *Rules of Professional Conduct* just like any other lawyer. Ethical violations by one in a position of public trust are even more egregious. *Committee on Legal Ethics v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989). The Court rejected respondent's argument that his role as Attorney General may sometimes require a constitutional duty to act as "servant of the people" in precedence over his ethical obligations.

Over the objections of the Office of Disciplinary Counsel, the Court accepted the Hearing Panel's recommendations. Public Reprimand, costs for part of the proceedings.

**Commission of crime**

***Committee on Legal Ethics v. Sydnor***, 450 S.E.2d 638 (1994) (Per Curiam)

Respondent pled guilty to failing to file a federal income tax return in violation of 26 U.S.C. 7201, a felony. The Committee recommended annulment of respondent's license and found a mitigation hearing inappropriate.

**ATTORNEYS**

**Discipline** (continued)

**Commission of crime** (continued)

***Committee on Legal Ethics v. Sydnor***, (continued)

Syl. pt. 1 - "In a court proceeding initiated by the *Committee on Legal Ethics of the West Virginia State Bar* to annul the license of an attorney to practice law, the burden is on the Committee to prove, by full, preponderating and clear evidence, the charges contained in the Committee's complaint." Syllabus Point 1, *Committee on Legal Ethics v. Pence*, W.Va., 216 S.E.2d 236 (1975).

Syl. pt. 2 - "Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics' burden of proving an ethical violation arising from such conviction." Syllabus Point 2, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).

The Court found the Committee met its burden of proof by submission of the order of conviction. Citing *Committee on Legal Ethics v. Boettner*, 183 W.Va. 136, 394 S.E.2d 735 (1990), the Court found a mitigation hearing appropriate. Here, however, respondent failed to request a hearing or even to respond to the Committee's petition to annul. License annulled.

***State v. Sloan***, 442 S.E.2d 724 (1994) (Per Curiam)

Respondent was found guilty of failure to pay money he collected in his professional capacity. *W.Va. Code*, 30-2-13.

Syl. pt. - " ' "Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics' burden of proving an ethical violation arising from such conviction." Syllabus Point 2, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).' Syl. Pt. 1, *Committee on Legal Ethics v. Boettner*, 183 W.Va. 136, 394 S.E.2d 735 (1990)." Syl. pt. 1, *Committee on Legal Ethics v. Folio*, 184 W.Va. 503, 401 S.E.2d 248 (1990).

**ATTORNEYS**

**Discipline** (continued)

**Commission of crime** (continued)

***State v. Sloan***, (continued)

A copy of the plea agreement was entered with the Court. License annulled; leave to delay effective date so as to secure substitute counsel for his clients denied. Annulment effective sixty days from date of opinion.

**Conflict between counsel and hearing panel**

***Lawyer Disciplinary Board v. Vieweg***, 461 S.E.2d 60 (1995) (Cleckley, J.)

See ATTORNEYS Discipline, Reinstatement, (p. 99) for discussion of topic.

**Conflict of interest**

***Lawyer Disciplinary Board v. Printz***, 452 S.E.2d 720 (1994) (Per Curiam)

Respondent, apparently a member of the firm which became part of Bowles, Rice, McDavid, Graff & Love (although the opinion does not recite that fact) represented Dr. Aurelio Benavides in an appeal regarding a partition suit instituted pursuant to a divorce. The former Mrs. Benavides was appealing the circuit court's denial of her upset bid in the partition suit; Dr. Benavides bought the former marital residence.

Ms. Sally Jackson, a former employee of respondent's firm, served as counsel to Mrs. Benavides on appeal. Ms. Jackson protested respondent's representation of Dr. Benavides in light of the firm's representation of Mrs. Benavides by two other attorneys in the firm, from October, 1980 through April, 1985, on matters of child support, visitation, alimony, assault and battery charge against Dr. Benavides, preparation of a will and a civil action against Dr. Benavides for breach of agreement. The Benavides were divorced 16 July 1980. Ms. Jackson did not respond to respondent's request for support of her allegation of conflicts. Respondent consulted with in-house ethics counsel, who also consulted with the ABA, and concluded no conflict existed.

**ATTORNEYS**

**Discipline** (continued)

**Conflict of interest** (continued)

***Lawyer Disciplinary Board v. Printz***, (continued)

Mrs. Benavides contacted the State Bar on 21 January 1992, requesting dismissal of respondent; she finally filed a complaint in March, 1992. Respondent alleged improper use of the disciplinary process in lieu of filing a motion to disqualify him; he also claims the Bar, by two years of inaction, waived any right to pursue this allegation. The hearing panel recommended a public reprimand for violation of Rules 1.9 and 1.10 of the *Rules of Professional Conduct*, plus costs.

Syl. pt. 1 - "Rule 1.9(a) of the *Rules of Professional Conduct*, precludes an attorney who has formerly represented a client in a matter from representing another person in the same or a substantially related matter that is materially adverse to the interests of the former client unless the former client consents after consultation. Syl. Pt. 2, *State ex rel. McClanahan v. Hamilton*, 189 W.Va. 290, 430 S.E.2d 569 (1993).

Syl. pt. 2 - "Under Rule 1.9(a) of the *Rules of Professional Conduct*, determining whether an attorney's current representation involves a substantially related matter to that of a former client requires an analysis of the facts, circumstances, and legal issues of the two representations." Syl. Pt. 3, *State ex rel. McClanahan v. Hamilton*, 189 W.Va. 290, 430 S.E.2d 569 (1993).

The Court found nothing improper here. The prior representation was not substantially related to the present matter. Cf. *State ex rel. McClanahan v. Hamilton*, 189 W.Va. 290, 430 S.E.2d 569 (1993). Actual participation in division of the proceeds may have been a different matter but here, respondent withdrew as counsel following only an initial status conference. Dismissed.

***Lawyer Disciplinary Board v. Simons***, No. 22442 (12/15/94) (Per Curiam)

Respondent was charged with a conflict of interest for being executor of an estate while also representing one of the beneficiaries in an action against two other beneficiaries; he also incompetently executed the will. Because the hearing panel recommended dismissal of charges, the Office of Disciplinary Counsel objected and, pursuant to Rule 3.11 of the *Rules of Lawyer Disciplinary Procedure*, brought this original action. Counsel requested three months suspension for violation of Rule 1.1 and Rule 1.7(b) of the *Rules of Professional Conduct*.

With regard to this standard, we have said in *In re Brown*, 166 W.Va. 226, 236 S.E.2d 567, 572 (1980):

> "[M]ost courts will give some weight to the recommendations of the Ethics Committee that conducts the reinstatement hearing simply because the Committee, having heard the witnesses, is in a better position to evaluate their testimony. This does not mean that the court is foreclosed from making an *independent assessment of the record* but it does mean absent a showing of some mistake of law or arbitrary assessment of the facts such recommendations made by the Ethics Committee in regard to reinstatement of an attorney are to be given substantial consideration. *Tardiff v. State Bar*, 27 Cal.3d 395, 612 P.2d 919, 165 Cal. Rptr. 829 (1980); *In re Wigoda*, 77 Ill.2d 154, 395 N.E.2d 571 (1979); *In re Hiss*, 368 Mass. 447, 333 N.E.2d 429 (1975); *In re Freedman*, 406 Mich. 256, 277 N.W.2d 635 (1979); *Petition of Harrington*, 134 Vt. 549, 367 A.2d 161 (1976)." (Emphasis added).

The Court found respondent's conduct showed poor judgment but was not subject to discipline.

## ATTORNEYS

**Discipline** (continued)

**Contempt for threatening court**

***State ex rel. Skaggs v. Plumley***, No. 22074 (2/2/94) (Per Curiam)

See HABEAS CORPUS Contempt of court, (p. 324) for discussion of topic.

**Continuing education requirements**

***W.Va. Continuing Legal Education Commission v. Carbone, et al.***, No. 22693 (3/24/95) (Per Curiam)

The twenty original respondents here failed to provide proof of compliance with continuing education requirements for the reporting period ending June 30, 1994. (See Chapter VII, Paragraph 5, Rules to Govern Mandatory Continuing Legal Education.) Following issuance of a rule to show cause, eleven showed proof of compliance. The Court ordered suspension of the others' licenses until they comply with the rules and pay penalties assessed by the MCLE.

**Conviction of crimes**

***Committee on Legal Ethics v. McCorkle***, 452 S.E.2d 377 (1994) (Cleckley, J.)

The Committee on Legal Ethics found respondent used cocaine and crack cocaine, improperly solicited clients and testified falsely before the Hearing Panel. They recommended respondent's license be suspended for two years and that he be required to obtain drug and alcohol counseling.

**ATTORNEYS**

**Discipline** (continued)

**Conviction of crimes** (continued)

***Committee on Legal Ethics v. McCorkle***, (continued)

Syl. pt. 1 - " ' " 'In a court proceeding initiated by the Committee on Legal Ethics of the West Virginia State Bar to annul [or suspend] the license of an attorney to practice law, the burden is on the Committee to prove, by full, preponderating and clear evidence, the charges contained in the Committee's complaint.' Syllabus Point 1, *Committee on Legal Ethics v. Pence*, W.Va., 216 S.E.2d 236 (1975)." Syl. pt. 1, *Committee on Legal Ethics v. Tatterson*, 173 W.Va. 613, 319 S.E.2d 381 (1984).' Syllabus Point 1, *Committee on Legal Ethics v. Tatterson*, 177 W.Va. 356, 352 S.E.2d 107 (1986)." Syllabus Point 1, *Committee on Legal Ethics v. Burdette*, 191 W.Va. 346, 445 S.E.2d 733 (1994).

Syl. pt. 2 - "Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics' burden of proving an ethical violation arising from such conviction." Syllabus Point 2, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).

Syl. pt. 3 - A *de novo* standard applies to a review of the adjudicatory record made before the Committee on Legal Ethics of the West Virginia State Bar as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the Committee's recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the Committee's findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.

Syl. pt. 4 - " ' "In deciding on the appropriate disciplinary action for ethical violations, this Court must consider not only what steps would appropriately punish the respondent attorney, but also whether the discipline imposed is adequate to serve as an effective deterrent to other members of the Bar and at the same time restore public confidence in the ethical standards of the legal profession." Syllabus Point 3, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987). 'Syllabus Point 5, *Committee on Legal Ethics v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989)." Syllabus Point 2, *Committee on Legal Ethics v. White*, 189 W.Va. 135, 428 S.E.2d 556 (1993).

**ATTORNEYS**

**Discipline** (continued)

**Conviction of crimes** (continued)

***Committee on Legal Ethics v. McCorkle***, (continued)

The Court noted that respondent must show that the Committee's findings of fact are not supported by reliable, probative and substantial evidence to overturn them on appeal. Here, respondent actually pled guilty to use of cocaine in July, 1992. The Court noted that the committee also considered mitigating factors and is attempting to help respondent with his problems.

His medical condition, however, seems to have no relation to solicitation charges and false testimony. The Court noted these violations, even absent drug charges, were sufficient for serious discipline. Suspension for two years, costs of proceeding and mandatory drug and alcohol treatment, description to be provided to the Bar every ninety days.

***Committee on Legal Ethics v. ReBrook***, No. 21975 (2/18/94) (Per Curiam)

The Committee sought annulment of respondent's license on account of his conviction of crimes reflecting his unfitness to practice law. Respondent was convicted in the *United States District Court* for wire fraud and insider trading.

Conviction of a crime involving fraud is a crime of moral turpitude requiring annulment. Art. VI, § 23, By-Laws of the West Virginia State Bar. *In re Smith*, 158 W.Va. 13, 206 S.E.2d 920 (1974); *In re Mann*, 151 W.Va. 644, 154 S.E.2d 860 (1967). Here, respondent voluntarily consented to annulment and the Court made the annulment official by order effective 11 January 1994.

***Lawyer Disciplinary Board v. Taylor***, 455 S.E.2d 569 (1995) (Per Curiam)

Respondent pled guilty to distribution of crack cocaine within 1,000 feet of a school. The Disciplinary Board sought annulment of his license to practice law.

**ATTORNEYS**

**Discipline** (continued)

**Conviction of crimes** (continued)

***Lawyer Disciplinary Board v. Taylor***, (continued)

Syl. pt. 1 - "In a court proceeding initiated by the Committee on Legal Ethics of the West Virginia State Bar to annul the license of an attorney to practice law, the burden is on the Committee to prove, by full, preponderating and clear evidence, the charges contained in the Committee's complaint." Syllabus Point 1, *Committee on Legal Ethics v. Pence*, W.Va., 216 S.E.2d 236 (1975).

Syl. pt. 2 - "Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics' burden of proving an ethical violation arising from such conviction." Syllabus Point 2, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).

The Board supplied a copy of the 21 September 1994 order of conviction. Burden of proof met.

**Divorce action**

***Lawyer Disciplinary Board v. Printz***, 452 S.E.2d 720 (1994) (Per Curiam)

See ATTORNEYS Discipline, Conflict of interest, (p. 62) for discussion of topic.

**Drugs or alcohol**

***Committee on Legal Ethics v. Massie***, No. 22370 (10/31/94) (Per Curiam)

Respondent failed to pursue claims; failed to communicate with her client; misrepresented the status of a retainer; maintained private practice while employed as a public defender, in violation of statutory prohibitions; and misrepresented facts to an unemployment benefit board. She was also convicted of aiding and abetting acquisition and possession, and causing to be acquired and possessed, a controlled substance.

**ATTORNEYS**

**Discipline** (continued)

**Drugs or alcohol** (continued)

***Committee on Legal Ethics v. Massie***, (continued)

"Where there has been a final criminal conviction, proof on the record of such conviction satisfies the Committee on Legal Ethics' burden of proving an ethical violation arising from such conviction." Syllabus Point 2, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).

The Court found sufficient evidence to support the Committee's findings and agreed with their recommendation to suspend. Suspended for minimum of two years, required to prove she is drug-free for at least two years prior to reinstatement, costs of proceeding.

***Office of Lawyer Disciplinary Counsel v. Karr***, No. 23024 (10/6/95) (Per Curiam)

See ATTORNEYS Incapacitation, Drugs or alcohol, (p. 109) for discussion of topic.

**Emergency suspension**

***Office of Disciplinary Counsel v. Battistelli***, 457 S.E.2d 652 (1995) (Workman, J.)

Petitioner claimed it received twenty-five legal ethics complaints against respondent since 1986; eleven were still active at the time of the petition, including three before the Hearing Panel; six of the remaining complaints related to respondent's asking clients to loan him money in violation of Rule 1.8(a). Five previous complaints resulted in some sort of disciplinary action. See *Committee on Legal Ethics v. Battistelli*, 185 W.Va. 109, 405 S.E.2d 242 (1991). Disciplinary Counsel requested temporary suspension pursuant to Rule 3.27 of the Rules of Lawyer Disciplinary Procedure.

Syl. pt. 1 - The special procedures outlined in Rule 3.27 of the West Virginia Rules of Lawyer Disciplinary Procedure should only be utilized in the most extreme cases of lawyer misconduct.

**ATTORNEYS**

**Discipline** (continued)

**Emergency suspension** (continued)

***Office of Disciplinary Counsel v. Battistelli***, (continued)

Syl. pt. 2 - When the Office of Disciplinary Counsel has obtained sufficient evidence to warrant the extraordinary measures contained in *West Virginia Rule of Lawyer Disciplinary Procedure* 3.27, its petition to this Court should contain, at a minimum, specific allegations of the misconduct alleged. Where necessary to aid the Court in its resolution of the matter, the petition should also refer to supporting documentation and affidavits. The respondent lawyer should then offer supporting documents and affidavits to counter the petition's allegations.

Syl. pt. 3 - If the Court, after proceeding in accordance with *West Virginia Rule of Lawyer Disciplinary Procedure* 3.27(c), concludes that the respondent lawyer should be temporarily suspended, it will so order. The Office of Disciplinary Counsel, however, must then expedite the resolution of the charges against the respondent and move to conclude the matter within ninety days after the suspension becomes effective.

Syl. pt. 4 - Given the practical difficulty of providing specific guidance on the instances where temporary suspension is appropriate, the Court will apply the two-part standard in *West Virginia Rule of Disciplinary Procedure* 3.27 to each petition on a case-by-case basis.

Syl. pt. 5 - Fairness to the client is the touchstone of *West Virginia Rule of Professional Conduct* 1.8(a).

Syl. pt. 6 - A lawyer who engages in a loan transaction with his or her client must, at a minimum, assure that the arrangement satisfies *West Virginia Rule of Professional Conduct* 1.8(a)(1) to (3).

Petitioner directed to hold hearings on pending matters no later than July 1, 1995. Petition granted; license suspended until all proceedings concluded.

**ATTORNEYS**

**Discipline** (continued)

**Failure to communicate with client**

***Committee on Legal Ethics v. Clay***, No. 22265 (11/2/94) (Per Curiam)

See ATTORNEY Discipline, Neglect, (p. 85) for discussion of topic.

**Failure to comply with terms of**

***Committee on Legal Ethics v. Keenan***, 450 S.E.2d 787 (1994) McHugh, J.)

Respondent's license was suspended indefinitely for failure to provide competent representation, failure to exercise due diligence, failure to communicate with clients and failure to return an unearned fee. Respondent did not notify clients of his suspension, took case files from his office and did not complete orders in domestic relations cases.

On 7 May 1993 and 29 July 1993 the Bar forwarded two ethics complaints to respondent, to which he did not respond. He failed to provide information on a third complaint, despite agreeing to do so on 29 June 1993. Finally, he did not respond to a current Statement of Charges alleging two other ethical violations concerning failure to prosecute a wrongful discharge suit (nor returning a fee); and failing to file a divorce action, resulting in loss of custody. Respondent also failed to respond to a subpoena to appear at the State Bar Center in connection with these charges. The Bar's petition to the Court for annulment was uncontested.

Syl. pt. 1 - " ' "In a court proceeding initiated by the Committee on Legal Ethics of the West Virginia State Bar to annul the license of an attorney to practice law, the burden is on the Committee to prove, by full, preponderating and clear evidence, the charges contained in the Committee's complaint." Syl. Pt. 1 *Committee on Legal Ethics v. Pence*, W.Va., 216 S.E.2d 236 (1975). Syllabus Point 1, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987)." Syl. pt. 1, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).

**ATTORNEYS**

**Discipline** (continued)

**Failure to comply with terms of** (continued)

***Committee on Legal Ethics v. Keenan***, (continued)

Syl. pt. 2 - "In order to expedite the investigation of an ethics complaint by the Bar, an attorney's failure to respond to a request for information concerning allegations of ethical violations within a reasonable time will constitute an admission to those allegations for the purposes of the disciplinary proceeding." Syl. pt. 2, *Committee on Legal Ethics v. Martin*, 187 W.Va. 340, 419 S.E.2d 4 (1992).

Syl. pt. 3 - A suspended attorney who fails to comply with the provisions of article VI, section 28 of the By-Laws of the West Virginia State Bar may have his or her license to practice law annulled upon proof by the Committee on Legal Ethics of the West Virginia State Bar by full, preponderating and clear evidence that the suspended attorney failed to comply with the provisions.

Since the charges were uncontested, the Court found the Bar had met its burden of proof. (See *Committee on Legal Ethics v. Tatterson*, 177 W.Va. 356, 352 S.E.2d 107 (1986); *Daily Gazette v. Committee on Legal Ethics*, 174 W.Va. 359, 326 S.E.2d 705 (1984); *Committee on Legal Ethics v. Mullins*, 159 W.Va. 647, 226 S.E.2d 427 (1976); *In re Daniel*, 153 W.Va. 839, 173 S.E.2d 153 (1970). Licenses annulled.

**Failure to follow reinstatement plan**

***Committee on Legal Ethics v. Cunningham***, No. 21717 (2/17/94) (Per Curiam)

Respondent failed to reimburse the Committee on Legal Ethics for costs of $2,247.67 in the proceeding brought by the Committee for neglecting a civil action. In that decision, respondent was publicly reprimanded and ordered to pay costs.

**ATTORNEYS**

**Discipline** (continued)

**Failure to follow reinstatement plan** (continued)

***Committee on Legal Ethics v. Cunningham***, (continued)

The Committee and respondent are in conflict over the terms of payment; the Court's original order did not specify any terms or the deadline for full payment. The Court ordered respondent to pay the entire amount by 30 June 1994.

***Committee on Legal Ethics v. Farber***, 447 S.E.2d 602 (1994) (Per Curiam)

Respondent had his license suspended for three months. *Committee on Legal Ethics v. Farber*, 185 W.Va. 522, 408 S.E.2d 274 (1991). Respondent has not reimbursed the Committee the $10,189.92 in expenses for that proceeding as ordered by the Court.

In addition, respondent was ordered to submit to supervision by another attorney for two years. On 9 March 1992 respondent proposed that he be supervised by William C. Garrett and that he be allowed to pay $200.00 per month until the expenses were reimbursed. The Court agreed and on 24 June 1992 respondent's license was reinstated.

Respondent failed to comply with his own proposal, meeting with Mr. Garrett on only one occasion and failing to make timely payments. In May, 1993, the Committee agreed to reduce the payments to $100.00 per month and that respondent would meet with Mr. Garrett regularly, with Mr. Garrett to submit written reports. Respondent again failed to make timely payments and no reports were filed; he did not acknowledge receipt of this current complaint, even failing to answer a subpoena duces tecum.

Citing Art. VI, § 20, By-Laws of the West Virginia State Bar, the Court found continuing jurisdiction to hear this complaint. License suspended for one year, effective upon service of the order in this case.

**ATTORNEYS**

**Discipline** (continued)

**Failure to follow reinstatement plan** (continued)

***Committee on Legal Ethics v. Martin***, No. 20859 (2/18/94) (Per Curiam)

Respondent was publicly reprimanded for failure to respond to a legal ethics complaint and failure to cooperate with the investigation of the complaint. Respondent was directed to pay $469.00 for the costs of the proceeding.

Citing Art. VI, § 20 of the By-Laws of the State Bar, the Court ordered respondent to pay within sixty days of the date of the order or have his license annulled.

***Committee on Legal Ethics v. Simmons***, No. 22131 (5/20/93) (Per Curiam)

Respondent was given a public reprimand for failure to file forty-two final orders and other matters in criminal cases adjudicated while he was prosecuting attorney of Pocahontas County and for failing to return a client's file after termination of representation.

Respondent refused to pay costs assessed by the Committee. The Court required respondent to pay $2,022.79 and pass the Multi-State Professional Responsibility Examination before being reinstated.

**Failure to prepare final order**

***Committee on Legal Ethics v. Simmons***, No. 22131 (5/20/93) (Per Curiam)

See ATTORNEYS Discipline, Failure to follow reinstatement plan, (p. 74) for discussion of topic.

**Discipline** (continued)

**Failure to report discipline in another jurisdiction**

***Committee on Legal Ethics v. Goodman***, 441 S.E.2d 382 (1994) (Per Curiam)

See ATTORNEYS Discipline, Misconduct in another jurisdiction, (p. 82) for discussion of topic.

**Failure to respond to bar counsel**

***Committee on Legal Ethics v. Clay***, No. 22265 (11/2/94) (Per Curiam)

See ATTORNEY Discipline, Neglect, (p. 85) for discussion of topic.

***Committee on Legal Ethics v. Keenan***, 450 S.E.2d 787 (1994) McHugh, J.)

See ATTORNEYS Discipline, Failure to comply with terms of, (p. 71) for discussion of topic.

***Lawyer Disciplinary Board v. Beveridge***, 459 S.E.2d 542 (1995) (Per Curiam)

Respondent agreed to pursue an employee matter for complainant. After reviewing an employee handbook, respondent accepted $600 from complainant and wrote a letter dated 29 June 1988, with a complaint attached, saying the complaint would be filed. A fee agreement was also enclosed, which complainant did not promptly return. Respondent did file 2 February, 1989.

Thereafter, complainant was unable to reach respondent by phone; upon finally reaching him, respondent recalls that complainant was upset. Respondent offered to be discharged and return part of the $600 paid. Complainant instead filed a complaint, respondent answered and nothing further was done. Respondent kept complainant's employee handbook, payroll records and 401(k) distribution form.

**ATTORNEYS**

**Discipline** (continued)

**Failure to respond to bar counsel** (continued)

***Lawyer Disciplinary Board v. Beveridge***, (continued)

Respondent acknowledged he did not undertake any discovery; complainant acknowledged he did not discharge respondent. Respondent claimed he did not pursue the case because he did not usually practice in the county in which it was filed, he thought the case would be removed to federal court and he moved his office while the case was pending.

In answer to initial Disciplinary Board inquiries respondent offered to terminate his representation upon written notice by complainant; he did not, however, communicate with complainant. Complainant's case was ultimately dismissed for inaction but respondent did not inform complainant. After complainant wrote to the Bar that he wanted respondent to "go ahead with our case," respondent discovered that the statutory time period had run; again, he did not tell complainant. Respondent ultimately refunded the entire $600 fee after the following exchange.

The Bar first wrote respondent 10 October 1990, sending the complaint; respondent replied 1 November 1990. The Bar next wrote 6 January 1992, stating complainant's willingness to continue; respondent did not reply. The Bar then wrote on 11 March 1992 noting no reply from the January letter, which respondent apparently did not receive. Respondent telephoned the Bar sometime after February, 1992. The Bar called respondent 27 April 1993 regarding status; wrote a letter 7 May 1993, apparently not received until 1994; and another letter 24 June 1993 which was also not received until 1994; and a final letter 14 March 1994, enclosing copies of the others.

Syl. pt. 1 - "Rule 3.7 of the Rules of Lawyer Disciplinary Procedure, effective July 1, 1994, requires the Office of Disciplinary Counsel to prove the allegations of the formal charge by clear and convincing evidence. Prior cases which required that ethics charges be proved by full, preponderating and clear evidence are hereby clarified." Syllabus Point 1, *Lawyer Disciplinary Board v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850 (1995).

**ATTORNEYS**

**Discipline** (continued)

**Failure to respond to bar counsel** (continued)

***Lawyer Disciplinary Board v. Beveridge***, (continued)

Syl. pt. 2 - " 'The *Rules of Professional Conduct* state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action.' Syllabus Point 3, *Committee on Legal Ethics v. Tatterson*, 173 W.Va. 613, 319 S.E.2d 381 (1984)." Syllabus Point 9, *Committee on Legal Ethics v. Cometti*, 189 W.Va. 262, 430 S.E.2d 320 (1993).

Syl. pt. 3 - " 'An attorney violates West Virginia Rule of Professional Conduct 8.1(b) by failing to respond to requests of the West Virginia State Bar concerning allegations in a disciplinary complaint. Such a violation is not contingent upon the issuance of a subpoena for the attorney, but can result from the mere failure to respond to a request for information by the Bar in connection with an investigation of an ethics complaint.' Syllabus Point 1, *Committee on Legal Ethics v. Martin*, 187 W.Va. 340, 419 S.E.2d 4 (1992)." Syllabus Point 5, *Committee on Legal Ethics v. Cometti*, 189 W.Va. 262, 430 S.E.2d 320 (1993).

Syl. pt. 4 - "A *de novo* standard applies to a review of the adjudicatory record made before the Committee on Legal Ethics of the West Virginia State Bar as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the Committee's recommendations while ultimately exercising its won independent judgment. On the other hand, substantial deference is given to the Committee's findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record." Syl. pt. 3, *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994).

The Court found respondent violated Rule 1.3 by failing to act with reasonable diligence; and Rule 1.4(b) by failing to provide complainant with sufficient information to make informed decisions. Further, respondent violated Rule 1.16(d) by failing to protect his client when he deemed his representation was over. Finally, respondent did not cooperate with the Bar as required by Rule 8.1(b).

**ATTORNEYS**

**Discipline** (continued)

**Failure to respond to bar counsel** (continued)

***Lawyer Disciplinary Board v. Beveridge***, (continued)

Finding lack of organization the principal problem here, the Court ordered six months of supervised practice, with costs.

***Lawyer Disciplinary Board v. Friedman***, 452 S.E.2d 449 (1994) (Per Curiam)

On February 12, 1993 a Dr. Midkiff filed a complaint that respondent had failed to pay for medical services for respondent's clients, despite assurances of payment. By letter dated March 17, 1993, Chief Disciplinary Counsel advised respondent of the complaint and asked for a reply within three weeks. Respondent did not respond.

On May 7, 1993, Counsel again wrote to respondent, advising him of the holding in *Committee on Legal Ethics v. Martin*, 187 W.Va. 340, 419 S.E.2d 4 (1992) that failure to respond is itself an ethical violation and warning that further silence would result in presentation to the Investigative Panel. Following further silence, on 1 December 1993 Counsel advised respondent that unless payment was made before the Panel's January, 1994 meeting, she would recommend charges.

No response was made and the Panel voted to find probable cause for a hearing; notice and Statement of Charges were personally served on February 25, 1994. Respondent failed to answer until March 30, 1994, the date of the hearing. Respondent represented at the hearing that he was sorry, and that he had paid Dr. Midkiff. The Panel found the original complaint to be moot but charged respondent with a violation of Rule 8.1 of the *W.Va. Rules of Professional Conduct* for failing to respond to Bar counsel and recommended suspension for one month.

**ATTORNEYS**

**Discipline** (continued)

**Failure to respond to bar counsel** (continued)

***Lawyer Disciplinary Board v. Friedman***, (continued)

Syl. pt. 1 - " 'In a court proceeding prosecuted by the Committee on Legal Ethics of the West Virginia State Bar for the purpose of having suspended the license of an attorney too practice law for a designated period of time, the burden is on the Committee to prove by full, preponderating and clear evidence the charges contained in the complaint filed on behalf of the Committee.' Syllabus Point 1, *Committee on Legal Ethics v. Lewis*, 156 W.Va. 809, 197 S.E.2d 312 (1973)." Syllabus Point 1, *Committee on Legal Ethics v. Cometti*, 189 W.Va. 262, 430 S.E.2d 320 (1993).

Syl. pt. 2 - "An attorney violates *West Virginia Rule of Professional Conduct* 8.1(b) by failing to respond to requests of the *West Virginia State Bar* concerning allegations in a disciplinary complaint. Such a violation is not contingent upon the issuance of a subpoena for the attorney, but can result from the mere failure to respond to a request for information by the Bar in connection with an investigation of an ethics complaint." Syllabus Point 1, *Committee on Legal Ethics v. Martin*, 187 W.Va. 340, 419 S.E.2d 4 1992).

Syl. pt. 3 - "This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syllabus Point 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984), *cert. denied*, 470 U.S. 1028, 105 S.Ct. 1395, 84 L.Ed.2d 783 (1985).

Noting that the underlying complaint was resolved, the Court found a public reprimand sufficient punishment.

***Lawyer Disciplinary Board v. Taylor***, 451 S.E.2d 440 (1994) (Per Curiam)

See ATTORNEYS Discipline, Annulment, (p. 55) for discussion of topic.

## ATTORNEYS

### Discipline (continued)

#### Failure to rule on estate

***Committee on Legal Ethics v. Fletcher***, No. 22132 (5/20/94) (Per Curiam)

Respondent was charged with failure to complete a matter he heard as fiduciary commissioner in violation of Rule 8.4(d) of the *Rules of Professional Conduct*. Respondent claimed the Committee did not have jurisdiction since a nonlawyer could be a fiduciary commissioner.

The Court rejected respondent's jurisdictional claim, noting that other cases have held lawyers responsible even when acting in an administrative capacity which could be accomplished by a non-lawyer. *Committee on Legal Ethics v. Veneri*, 186 W.Va. 210, 411 S.E.2d 865 (1991); *Committee on Legal Ethics v. Smith*, 184 W.Va. 6, 399 S.E.2d 36 (1990). Public reprimand, costs of $417.59.

#### Failure to settle personal injury matter

***Lawyer Disciplinary Board v. Cunningham***, 464 S.E.2d 181 (1995) (Recht, J.)

Respondent filed a civil action in 1985 based on injuries his client received in a 1983 automobile accident. Respondent received offers of $3,500, $6,500 and $7,500; he sought $35,000. Following filing of an offer of judgment for $7,500, a status conference was ordered but was continued. The circuit court (apparently erroneously) entered an order dismissing the action with prejudice on the same day the status conference was to have been held; neither lawyer received a copy of the order.

Subsequently, the insurance company agreed to settle the case for $13,000 and defense counsel forwarded the check to respondent, along with an order to dismiss the case. Respondent claimed he told the company representative he needed to consult with his client but acknowledged receipt of the check. The client claimed she was not informed of the check but both respondent and his secretary say otherwise. However, respondent clearly did not respond to defense counsel's letter.

**ATTORNEYS**

**Discipline** (continued)

**Failure to settle personal injury matter** (continued)

***Lawyer Disciplinary Board v. Cunningham***, (continued)

Syl. pt. 1 - On motion and upon a proper showing, this Court may relieve the Office of Disciplinary Counsel or the lawyer, subject to the disciplinary recommendation, of the requirement found in Rule 3.11 of the *Rules of Lawyer Disciplinary Procedure* (1994), that written consent or objection to the disposition of the formal charge recommended by the Hearing Subcommittee of the Lawyer Disciplinary Board must be filed with the Clerk of this Court within thirty days of such recommendation. A motion for relief from the Rule 3.11 time limitation will be considered by this Court as if the motion were made under Rule 60(b) (1960) of the *W.Va.R.Civ.P.* Such relief motion must be made within a reasonable time, and for reasons (1), (2), (3), and (6) of Rule 60(b) not more than four (4) months after the report of the Hearing Subcommittee of the Lawyer Disciplinary Board is filed with the Clerk of this Court.

Syl. pt. 2 - "Rule 3.7 of the Rules of Lawyer Disciplinary Procedure, effective July 1, 1994, requires the Office of Disciplinary Counsel to prove the allegations of the formal charge by clear and convincing evidence. Prior cases which required that ethics charges be proved by full, preponderating and clear evidence are hereby clarified." Syllabus Point 1, *Lawyer Disciplinary Board v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850 (1995).

Syl. pt. 3 - " 'A *de novo* standard applies to a review of the adjudicatory record made before the [Lawyer Disciplinary Board] as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the [Board's] recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the [Board's] findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record." Syl. pt. 3, *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994)." Syllabus Point 2, *Lawyer Disciplinary Board v. McGraw*, 194 W.Va. 788, 461 S.E.2d 850 (1995).

## ATTORNEYS

### Discipline (continued)

#### Failure to settle personal injury matter (continued)

***Lawyer Disciplinary Board v. Cunningham***, (continued)

The Court excused respondent's failure to file a timely response in this matter, finding the time limits nonjurisdictional. The Court accepted the Disciplinary Board's finding that respondent neglected this matter. Public reprimand; two year supervised practice and costs.

#### Incapacitation

***Committee on Legal Ethics v. Bunner***, No. 22331 (7/13/95) (Per Curiam)

See ATTORNEYS Incapacitation, (p. 108) for discussion of topic.

#### Misconduct in another jurisdiction

***Committee on Legal Ethics v. Goodman***, 441 S.E.2d 382 (1994) (Per Curiam)

Respondent was allowed to permanently resign his Florida law license 13 March 1986 as a result of charges alleging he used client trust funds in a check kiting scheme. Unlike West Virginia, Florida does not allow re-application following resignation or annulment. On 16 November 1987 respondent pled guilty to an unrelated charge of grand larceny after trust. He reported neither to the West Virginia State Bar.

Upon discovery of his permanent resignation, the Committee began proceedings. Respondent failed to appear at the hearing, despite receiving notice and assuring the hearing panel he would appear. Similarly, respondent did not file a brief with the Court. The Committee recommended that respondent be deemed to have resigned from the Bar without leave to reapply.

**ATTORNEYS**

**Discipline** (continued)

**Misconduct in another jurisdiction** (continued)

***Committee on Legal Ethics v. Goodman***, (continued)

Syl. pt. 1 - "Article VI, Section 28-A(a) of the By-laws of the *West Virginia State Bar* provides that a final adjudication of professional misconduct in another jurisdiction conclusively establishes the fact of such misconduct for purposes of reciprocal disciplinary proceedings here." Syl. pt. 2, *Committee on Legal Ethics v. Battistelli*, 185 W.Va. 109, 405 S.E.2d 242 (1991).

Syl. pt. 2 - "Article VI, Section 28-A(b) of the By-Laws of the West Virginia State Bar places an affirmative duty on a lawyer to report the fact that he has been publicly disciplined or required to surrender his license to practice in a foreign jurisdiction." Syl. pt. 3, *Committee on Legal Ethics v. Battistelli*, 185 W.Va. 109, 405 S.E.2d 242 (1991).

Syl. pt. 3 - "Under Article VI, Section 28-A(e) of the By-Laws of the West Virginia State Bar an attorney's right to challenge the disciplinary action of a foreign jurisdiction is limited to the following four grounds: (1) the procedure followed in the other jurisdiction violated due process; (2) there was a total infirmity of proof of misconduct; (3) imposition of the same discipline would result in a grave injustice; or (4) the misconduct warrants a substantially different type of discipline." Syl. pt. 4, *Committee on Legal Ethics v. Battistelli*, 185 W.Va. 109, 405 S.E.2d 242 (1991).

The Court rejected respondent's argument (made during a pre-hearing conversation) that his Florida resignation was not in lieu of disciplinary proceedings. License annulled.

## ATTORNEYS

**Discipline** (continued)

### Misrepresentation on bar application

***Lawyer Disciplinary Board v. Kohout***, No. 22629 (4/14/95) (Per Curiam)

Respondent answer "no" to a question on the character questionnaire form for admission to the Bar regarding whether he had ever been suspended or expelled from a college, university or law school. During law school respondent stole books from the university book store and was suspended; he was subsequently refused readmission. He applied and was admitted to another law school and also answered untruthfully to that school regarding prior discipline, including denying his schooling was interrupted.

Further, respondent filed a "corrected' deed of trust in a bankruptcy filing in violation of an automatic stay, effective upon filing of the bankruptcy petition. New language was added to the original deed of trust and then a photocopy submitted. The altered document gave the bankrupt client's relatives rights to his property. The bankruptcy court investigated and found other intentional misrepresentations, resulting in suspension of respondent's privilege to practice in bankruptcy court for three years.

The Court found respondent violated DR 1-101(A) and 1-102 of the *Code of Professional Responsibility*, *People v. Culpepper*, 645 P.2d 5 (Colo. 1982); *In re Mitan*, 387 N.E.2d 278 (Ill. 1979); *Attorney Grievance Commission of Maryland v. Gilbert*, 387 Md. 481, 515 A.2d 454 (Md. 1986); and *In re Elliot*, 235 S.E.2d 111 (S.C. 1977); and that reciprocal discipline was appropriate in light of the bankruptcy suspension. *Committee on Legal Ethics v. Battistelli*, 185 W.Va. 109, 405 S.E.2d 242 (1991).

Finding that individual facts and circumstances control in setting discipline, *Committee on Legal Ethics v. Hobbs*, 190 W.Va. 606, 439 S.E.2d 629 (1993), *Committee on Legal Ethics v. Boettner*, 188 W.Va. 1, 422 S.E.2d 478 (1992), the Court suspended respondent for two years, required that respondent undergo counseling until the counselor certifies that respondent appreciates the ethical implications of intentional deception and required that he pass the Multistate Professional Responsibility Examination before readmission.

## ATTORNEYS

### Discipline (continued)

#### Mitigating factors

***Committee on Legal Ethics v. Farber***, 447 S.E.2d 602 (1994) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 95) for discussion of topic.

#### Neglect

***Committee on Legal Ethics v. Clay***, No. 22265 (11/2/94) (Per Curiam)

Respondent failed to pursue two matters entrusted to him, failed to communicate with clients, and failed to return client files after closure of his law office. Respondent also failed to respond to Bar counsel concerning a complaint. The Committee charged respondent with violating Rule 6-101 and 2-110 of the Code of Professional Responsibility, as well as Rule 8.1(b) of the Rules of Professional Conduct.

The Court found respondent committed the alleged violations and suspended his license for three months, with costs.

***Committee on Legal Ethics v. Karl***, 449 S.E.2d 277 (1994) (McHugh, J.)

Respondent is a sitting circuit judge. Prior to becoming a judge, while acting as title counsel for Marshall County Sewerage District, and as a lawyer for two private clients respondent exhibited a pattern of neglect.

As to the sewer district, respondent contended that he was only to record easements. The Chairman of the district contended respondent was to have drawn up, executed and recorded the easements, a process requiring the signatures of the affected owners. None of the 68 executed easements were recorded, nor easements executed for an additional 52 sites. Respondent failed to reply either to the Chairman or to Bar Counsel after a complaint was filed. Respondent did appear in response to a subpoena but did not deliver the easements in one week as promised; the easements were delivered several months later. Several property owners who were originally willing to give the easements required payment.

***Committee on Legal Ethics v. Karl***, (continued)

Respondent was appointed to represent Thomas Drescher in an appeal for his 1986 conviction of murder; respondent also represented Drescher in unrelated federal charges, resulting in an arson conviction. Subsequently, Drescher was charged with murder in California; because prior convictions constituted "special circumstances" allowing the death penalty, Drescher's California attorney made repeated attempts to obtain documents from respondent and to discuss the case. After several months, respondent finally asked for a $500.00 deposit and informed California counsel his hourly charge was $85.00, copying to be charged at $0.40 per page. California counsel considered the rates exorbitant and demanded the files for both the murder and arson convictions, enclosing written release from Drescher and $25.00 in mailing costs. Counsel also wrote the Court requesting assistance, sending a copy to the State Bar. Bar Counsel informed respondent that an ethics complaint was opened but respondent did not reply.

The brother of a murder victim paid respondent $10,000 to assess evidence and bring suspects to trial as a private prosecutor after the prosecuting attorney found insufficient evidence. After respondent presented evidence before a grand jury, which returned a true bill, the Court held that a private prosecutor could not appear before a grand jury. The indictment was dismissed.

The prosecuting attorney agreed to present the evidence herself, on condition that respondent would handle subsequent proceedings. After another true bill was returned respondent failed to answer motions to suppress, motions to dismiss and an "omnibus discovery motion." Respondent claimed he was working on responses but did not notify the prosecuting attorney, who moved to dismiss the indictments.

**ATTORNEYS**

**Discipline** (continued)

**Neglect** (continued)

***Committee on Legal Ethics v. Karl***, (continued)

Syl. pt. 1 - "In a court proceeding prosecuted by the *Committee on Legal Ethics of the West Virginia State Bar* for the purpose of having suspended the license of an attorney to practice law for a designated period of time, the burden is on the Committee to prove by full preponderating and clear evidence the charges contained in the complaint filed on behalf of the Committee." Syl. pt. 1, *Committee on Legal Ethics v. Lewis*, 156 W.Va. 809, 197 S.E.2d 312 (1973).

Syl. pt. 2 - "An attorney violates West Virginia Rule of Professional Conduct 8.1(b) by failing to respond to requests of the West Virginia State Bar concerning allegations in a disciplinary complaint. Such a violation is not contingent upon the issuance of a subpoena for the attorney, but can result from the mere failure to respond to a request for information by the Bar in connection with an investigation of an ethics complaint." Syllabus Point 1, *Committee on Legal Ethics v. Martin*, 187 W.Va. 340, 419 S.E.2d 4 1992).

Syl. pt. 3 - "In the exercise of their inherent power the courts may supervise, regulate and control the practice of law by duly authorized attorneys and prevent the unauthorized practice of law by any person, agency or corporation." Syl. pt. 10, *West Virginia State Bar v. Farley*, 144 W.Va. 504, 109 S.E.2d 420 (1959).

Syl. pt. 4 - "Article eight, section one *et seq.* of the *West Virginia Constitution* vests in the Supreme Court of Appeals the authority to define, regulate and control the practice of law in West Virginia." Syl. pt. 1, *Lane v. West Virginia State Board of Law Examiners*, 170 W.Va. 583, 295 S.E.2d 670 (1982).

Syl. pt. 5 - Pursuant to article VIII, section 8 of the *West Virginia Constitution*, this Court has the inherent and express authority to "prescribe, adopt, promulgate and amend rules prescribing a judicial code of ethics, and a code of regulations and standards of conduct and performances for justices, judges and magistrates, along with sanctions and penalties for any violation thereof[.]"

**ATTORNEYS**

**Discipline** (continued)

**Neglect** (continued)

***Committee on Legal Ethics v. Karl***, (continued)

Syl. pt. 6 - Pursuant to article II, section 4 of the *By-Laws of the West Virginia State Bar*, a lawyer, whose license to practice law has been suspended, shall not be enrolled as an inactive member of the State Bar while such license is suspended. Furthermore, a judge of a court of record in this State shall not be enrolled as an inactive member of the State Bar if his or her license to practice law has been suspended. Because a judge of a court of record must attain inactive status through enrollment and without suspension, a lawyer, whose license to practice law has been suspended, does not satisfy the fundamental standards of conduct required of a lawyer to assume or hold judicial office as prescribed by this Court pursuant to article VIII, section 8 of the *West Virginia Constitution*.

Syl. pt. 7 - "This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syllabus Point 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984).' Syl. pt. 1, *Committee on Legal Ethics v. Charonis*, 184 W.Va. 268, 400 S.E.2d 276 (1990)." Syl. pt. 1 *Committee on Legal Ethics v. Ikner*, 190 W.Va. 433, 438 S.E.2d 613 (1993).

Syl. pt. 8 - "Under the authority of the Supreme Court of Appeal's inherent power to supervise, regulate and control the practice of law in this State, the Supreme Court of Appeals may suspend the license of a lawyer or may order such other actions as it deems appropriate, after providing the lawyer with notice and an opportunity to be heard, when there is evidence that a lawyer (1) has committed a violation of the Rules of Professional Conduct or is under a disability and (F2) poses a substantial threat of irreparable harm to the public until the underlying disciplinary proceeding has been resolved." Syl. pt. 2, *Committee on Legal Ethics v. Ikner*, 190 W.Va. 433, 438 S.E.2d 613 (1993.

The Court found respondent dilatory and remiss in his duties to communicate with clients and with Bar Counsel, all in violation of Rules 1.16(d), 1.3, 1.4 and 8.1(b) of the Rules of Professional Conduct.

**ATTORNEYS**

**Discipline** (continued)

**Neglect** (continued)

***Committee on Legal Ethics v. Karl***, (continued)

The Court found respondent subject to discipline, even though he is currently on inactive status as a member of the Bar as a result of becoming a judge. Further, having the authority to discipline judges also allows discipline. The Court emphasized that the discipline here is related to respondent's status as a lawyer, which carries with it the obligations of an attorney even while sitting as a judge.

Three-month suspension plus costs. Respondent cannot serve a judge during the time he is suspended since he does not meet the requirements for being on inactive status in good standing. Automatic reinstatement at the end of three months.

***Lawyer Disciplinary Board v. Cunningham***, 464 S.E.2d 181 (1995) (Recht, J.)

See ATTORNEYS Discipline, Failure to settle personal injury matter, (p. 80) for discussion of topic.

**Overcharging in workers' compensation**

***Committee on Legal Ethics v. Burdette***, 445 S.E.2d 733 (1994) (Per Curiam)

Respondent charged workers compensation claimants 20% of their "back pay" (awarded for the time from the date of the injury until the settlement), in addition to 20% of the maximum of 208 weeks of their benefits as allowed by statute. *W.Va. Code*, 23-5-5; *Committee on legal Ethics v. Coleman*, 180 W.Va. 493, 377 S.E.2d 485 (1988).

**ATTORNEYS**

**Discipline** (continued)

**Overcharging in workers' compensation** (continued)

***Committee on Legal Ethics v. Burdette***, (continued)

Beginning in January, 1989, respondent wrote four claimants a letter asking them to sign and return a letter acknowledging that the fee would be 20% of both back pay and future monthly benefits, up to a maximum of 208 weeks. Respondent claimed this letter waived the statutory limit on attorneys' fees, allowing him to charge the excess.

Syl. pt. 1 - " ' "In a court proceeding initiated by the *Committee on Legal Ethics of the West Virginia State Bar* to annul [or suspend] the license of an attorney to practice law, the burden is on the Committee to prove, by full, preponderating and clear evidence, the charges contained in the Committee's complaint." Syllabus Point 1, *Committee on Legal Ethics v. Pence*, W.Va., 216 S.E.2d 236 (1975).' Syl. pt. 1, *Committee on Legal Ethics v. Tatterson*, 173 W.Va. 613, 319 S.E.2d 381 (1984)." Syllabus Point 1, *Committee on Legal Ethics v. Tatterson*, 177 W.Va. 356, 352 S.E.2d 107 (1986).

Syl. pt. 2 - "Under *W.Va. Code*, 23-5-5 [1975], an attorney's fee for assisting a workers' compensation claimant in obtaining a permanent total disability award, consisting of accrued and future benefits, is not to exceed twenty percent of the accrued and future benefits as one award subject to the 208-week limitation." Syllabus Point 1, *Committee on Legal Ethics v. Coleman*, 180 W.Va. 493, 377 S.E.2d 485 (1988).

Noting that a lawyer occupies a position of trust, *Committee on Legal Ethics v. White*, 176 W.Va. 753, 349 S.E.2d 919 (1986), the Court held no waiver is possible with workers compensation attorneys' fees. Suspended for one year; repayment of excess fees, with interest; payment of costs.

**Prior discipline**

***Lawyer Disciplinary Board v. Taylor***, 451 S.E.2d 440 (1994) (Per Curiam)

See ATTORNEYS Discipline, Annulment, (p. 55) for discussion of topic.

**ATTORNEYS**

**Discipline** (continued)

**Prohibition against ethics proceeding**

***State ex rel. Scales v. Committee on Legal Ethics***, 446 S.E.2d 729 (1994) (Per Curiam)

See PROHIBITION Ethics proceedings, (p. 534) for discussion of topic.

**Proposed agreements**

***Lawyer Disciplinary Board v. McCormick***, No. 22432 (2/17/95) (Per Curiam)

See ATTORNEYS Discipline, Record insufficient, (p. 93) for discussion of topic.

**Public reprimand**

***Committee on Legal Ethics v. Sheatsley***, 452 S.E.2d 75 (1994) (McHugh, J.)

See ATTORNEYS Discipline, Witness' payment contingent on testimony, (p. 104) for discussion of topic.

***Lawyer Disciplinary Board v. Friedman***, 452 S.E.2d 449 (1994) (Per Curiam)

See ATTORNEYS Discipline, Failure to respond to bar counsel, (p. 78) for discussion of topic.

***Lawyer Disciplinary Board v. McGraw***, 461 S.E.2d 850 (1995) (McHugh, C.J.)

See ATTORNEYS Discipline, Attorney/client relationship, (p. 57) for discussion of topic.

## ATTORNEYS

### Discipline (continued)

#### Real estate release not filed

***Committee on Legal Ethics v. Shingleton***, No. 22171 (5/20/94) (Per Curiam)

Respondent failed to perfect real estate titles which he certified and for some of which he issued title insurance as agent for a title insurance company. Respondent assumed that releases had been filed for liens which had indeed been paid off, thinking the clerk of the county commission had simply failed to mail them.

Respondent took immediate action to cure the problem when it came to his attention. The Committee charged respondent with a violation of DR-101(A)(3), neglecting a legal matter.

Noting that a single instance of misconduct is not normally sufficient for an ethical violation, *Committee on Legal Ethics v. Mullins*, 159 W.Va. 647, 226 S.E.2d 427 (1976), the Court found a long period of repeated dereliction here. Public reprimand and costs. (See *Kentucky Bar Association v. Yates*, 677 S.W.2d 304 (Ky. 1984); *Florida Bar v. G.B.T.*, 399 So.2d 357 (Fla. 1981).

#### Reciprocal discipline

***Committee on Legal Ethics v. Goodman***, 441 S.E.2d 382 (1994) (Per Curiam)

See ATTORNEYS Discipline, Misconduct in another jurisdiction, (p. 82) for discussion of topic.

#### Recommendations outside of agreement

***Lawyer Disciplinary Board v. McCormick***, No. 22432 (2/17/95) (Per Curiam)

See ATTORNEYS Discipline, Record insufficient, (p. 93) for discussion of topic.

**ATTORNEYS**

**Discipline** (continued)

**Record insufficient**

***Lawyer Disciplinary Board v. McCormick***, No. 22432 (2/17/95) (Per Curiam)

Respondent was charged with neglect. At the resultant hearing, respondent and the Board entered into a proposed agreement which required respondent to enter into one year of supervised practice, and submit monthly reports to the State Bar. The Board also recommended that he be publicly reprimanded. Respondent objected, saying the reprimand was not part of the agreement.

Respondent argued that no harm had come to any client and that no useful purpose would be served by a reprimand. The Hearing Panel argued it has authority to recommend an additional sanction while adopting the Disciplinary Counsel's recommendation. Further, the Panel stated its recommendations are to be given substantial consideration and be upheld absent arbitrary assessment of the facts or mistake of law.

The Court noted it reviews the record of disciplinary proceedings *de novo*, despite giving "substantial deference" to the Committee's findings. See Syllabus Point 3, *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994). Finding that respondent may have put on more evidence had he known that disciplinary sanctions would be imposed, the Court remanded this matter to the Lawyer Disciplinary Board for further development.

**Rehabilitation**

***Committee on Legal Ethics v. Massie***, No. 22370 (10/31/94) (Per Curiam)

See ATTORNEYS Discipline, Drugs or alcohol (p. 68) for discussion of topic.

***Lawyer Disciplinary Board v. Pence***, 461 S.E.2d 114 (1995) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 97) for discussion of topic.

**ATTORNEYS**

**Discipline** (continued)

**Rehabilitation** (continued)

***Lawyer Disciplinary Board v. Vieweg***, 461 S.E.2d 60 (1995) (Cleckley, J.)

See ATTORNEYS Discipline, Reinstatement, (p. 99) for discussion of topic.

**Reinstatement**

***Committee on Legal Ethics v. Berzito***, No. 22201 (7/15/94) (Per Curiam)

Respondent is a 78 year old who was admitted to the State Bar in 1947. He practiced corporate law until his conviction of ten counts of mail fraud in 1972, as a result of which his license was annulled. *In re Berzito*, 156 W.Va. 201, 192 S.E.2d 227 (1972).

On 29 July 1993 respondent filed "Motion for the Restoration of My Toga of the Law," reciting that he had no intention of practicing, only seeking reinstatement so he could tell his grandchildren he was in good standing. Respondent has made a living as a corporate consultant and has not attended continuing education seminars or otherwise maintained his skills.

Despite the urging of Bar counsel, respondent twice passed up the chance for a hearing and chose to submit his petition on the record. The hearing panel found respondent lacked the necessary skill and knowledge to resume practice.

We explained the requirements for reinstatement to the practice of law in syllabus point 1 of *In re Brown*, 166 W.Va. 226, 236 S.E.2d 567 (1980).

**ATTORNEYS**

**Discipline** (continued)

**Reinstatement** (continued)

***Committee on Legal Ethics v. Berzito***, (continued)

> The general rule for reinstatement is that a disbarred attorney in order to regain admission to the practice of law bears the burden of showing that he presently possesses the integrity, moral character and legal competence to resume the practice of law. To overcome the adverse effect of the previous disbarment, he must demonstrate a record of rehabilitation. In addition, the court must conclude that such reinstatement will not have a justifiable and substantial adverse effect on the public confidence in the administration of justice and in this regard the seriousness of the conduct leading to disbarment is an important consideration.

The Court found respondent did not meet his burden of showing rehabilitation or that his reinstatement would not adversely affect the public. His failure to keep his skills current also was crucial. Request denied.

***Committee on Legal Ethics v. Farber***, 447 S.E.2d 602 (1994) (Per Curiam)

The Court suspended respondent's license in *Committee on Legal Ethics v. Farber*, 185 W.Va. 522, 408 S.E.2d 274 (1991) for falsely accusing a circuit judge of criminal acts and for other misdeeds. Upon reinstatement, respondent was to be supervised for two years and reimburse costs.

Attorney William Barrett agreed to supervise respondent and respondent agreed to make payments of $200.00 per month. The Committee alleged that from August, 1992 to May, 1993 respondent failed to comply with the terms. Mr. Garrett has filed only one written report. Respondent even agreed to meet with Mr. Garrett on a regular basis and submit monthly reports but has not complied. Further, he has not made payments as agreed.

**ATTORNEYS**

**Discipline** (continued)

**Reinstatement** (continued)

***Committee on Legal Ethics v. Farber***, (continued)

Syl. pt. - " ' "In disciplinary proceedings, this Court, rather than endeavoring to establish a uniform standard of disciplinary action, will consider the facts and circumstances [in each case], including mitigating facts and circumstances, in determining what disciplinary action, if any, is appropriate, and when the committee on legal ethics initiates proceedings before this Court, it has a duty to advise this Court of all pertinent facts with reference to the charges and the recommended disciplinary action." Syl. pt. 2, *Committee on Legal Ethics v. Mullins*, 159 W.Va. 647, 226 S.E.2d 427 (1976).' Syllabus Point 2, *Committee on Legal Ethics v. Higinbotham*, 176 W.Va. 186, 342 S.E.2d 152 (1986)." Syllabus Point 4, *Committee on Legal Ethics v. Roark*, 181 W.Va. 260, 382 S.E.2d 313 (1989).

The Court noted respondent has not taken any of his obligations seriously; he is to undertake an additional eighteen month period of supervision, dates to be determined by the Committee on Legal Ethics, in writing. Further, reinstatement is conditioned on respondent's satisfying his prior reimbursement obligation. Suspension until agreements are made.

(Note: the Court made clear that failure to comply with supervision arrangements may result in stringent sanctions, even annulment.)

***Committee on Legal Ethics v. Massie***, No. 22370 (10/31/94) (Per Curiam)

See ATTORNEYS Discipline, Drugs or alcohol (p. 68) for discussion of topic.

**ATTORNEYS**

**Discipline** (continued)

**Reinstatement** (continued)

***Lawyer Disciplinary Board v. Pence***, 461 S.E.2d 114 (1995) (Per Curiam)

Petitioner was suspended for one year for commingling client funds with his own, failing to pay client funds on demand and attempting to mislead the Committee on Legal Ethics. *Committee on Legal Ethics v. Pence*, W.Va., 216 S.E.2d 236 (1975). Petitioner was denied his petition for reinstatement pending resolution of other complaints then extant. *Committee on Legal Ethics v. Pence*, 161 W.Va. 240, 240 S.E.2d 668 (1978).

As a result of those outstanding complaints, petitioner was again charged with commingling funds, failing to pay client funds on demand, intentionally prejudicing a client, knowingly failing to disclose information required by law, making intentional false representations of fact, aiding a client in illegal conduct, and knowingly engaging in illegal and unethical conduct. Petitioner's law license was annulled 1 July 1975.

Petitioner filed a second petition for reinstatement. *Committee on Legal Ethics v. Pence*, 171 W.Va. 68, 297 S.E.2d 843 (1982). The Committee found petitioner had engaged in the unauthorized practice of law during his suspension; and that the public would be endangered by his reinstatement. Petition was denied, with costs to petitioner. Because of his failure to reimburse the Bar $22,210.52 his third petition for reinstatement was also denied.

Petitioner has now reimbursed the State Bar. Following extensive hearings, the current Hearing Panel recommended reinstatement. Disciplinary Counsel objected, noting that troublesome financial transactions, failure to reimburse former clients and business partners and misrepresenting himself as an attorney.

**ATTORNEYS**

**Discipline** (continued)

**Reinstatement** (continued)

***Lawyer Disciplinary Board v. Pence***, (continued)

Syl. pt. 1 - " *De novo* standard applies to a review of the adjudicatory record made before the Committee on Legal Ethics of the West Virginia State Bar as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the Committee's recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the Committee's findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record.' Syl. pt. 3, *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994)." Syl. Pt. 2, *Lawyer Disciplinary Board v. Vieweg*, 194 W.Va. 554, 461 S.E.2d 60 (1995).

Syl. pt. 2 - " 'The general rule for reinstatement is that a disbarred attorney in order to regain admission to the practice of law bears the burden of showing that he presently possesses the integrity, moral character and legal competence to resume the practice of law. To overcome the adverse effect of the previous disbarment, he must demonstrate a record of rehabilitation. In addition, the court must conclude that such reinstatement will not have a justifiable and substantial adverse effect on the public confidence in the administration of justice and in this regard the seriousness of the conduct leading to disbarment is an important consideration.' Syllabus Point 1, *In re Brown*, 166 W.Va. 226, 273 S.E.2d 567 (1980)." Syl. Pt. 3, *Lawyer Disciplinary Board v. Vieweg*, 194 W.Va. 554 461 S.E.2d 60 (1995).

Syl. pt. 3 - " 'Rehabilitation is demonstrated by a course of conduct that enables the court to conclude there is little likelihood that after such rehabilitation is completed and the applicant is readmitted to the practice of law he will engage in unprofessional conduct.' Syllabus Point 2, *In re Brown*, 166 W.Va. 226, 273 S.E.2d 567 (1980)." Syl. Pt. 4, *Lawyer Disciplinary Board v. Vieweg*, 194 W.Va. 554, 461 S.E.2d 60 (1995).

**ATTORNEYS**

**Discipline** (continued)

**Reinstatement** (continued)

***Lawyer Disciplinary Board v. Pence***, (continued)

Recognizing what may be genuine inability to pay past debts, along with five years of exemplary behavior, including volunteer positions involving significant financial responsibility, the Court ordered reinstatement with the following conditions: costs of this proceeding, continuing legal education prior to reinstatement, satisfaction of all debts outstanding (payment plan acceptable), five years of reporting of all business loans to disciplinary counsel, and supervision for first two years of reinstatement by an attorney approved by the Subcommittee (additional conditions imposed).

***Lawyer Disciplinary Board v. Vieweg***, 461 S.E.2d 60 (1995) (Cleckley, J.)

Petitioner applied for reinstatement of his license. Appellant's alcoholism resulted in his taking funds from his law firm, misappropriating clients' funds and those of a private dinner club of which he was a member, as well as misusing family trust funds. He also obtained loans under false pretenses from various banking institutions. On January 16, 1988 petitioner entered a treatment center upon the intervention of a state bar committee.

Petitioner has continued his recovery under his sponsor and attorney and worked successfully as a paralegal with the West Virginia Department of Transportation, and three law firms. Having voluntarily resigned from the Bar, petitioner has not practiced law since January 16, 1988. Following his guilty plea to knowingly filing a false financial statement, petitioner's voluntary resignation was changed to annulment of his license based on the felony on July 27, 1989.

Petitioner filed for reinstatement on August 27, 1993. Pursuant to Rule 3.10 of *Rules of Lawyer Disciplinary Procedure*, the Hearing Panel recommended against petitioner's reinstatement. Both Disciplinary Counsel and petitioner objected to the findings, noting that petitioner's undisputed rehabilitation was not given sufficient weight. Rules 3.11 and 3.33(c).

**ATTORNEYS**

**Discipline** (continued)

**Reinstatement** (continued)

***Lawyer Disciplinary Board v. Vieweg***, (continued)

Syl. pt. 1 - "In cases involving reinstatement proceedings, we require, under this Court's supervisory powers, that the Committee on Legal Ethics of The West Virginia State Bar shall hold an evidentiary hearing to enable a record to be made on the issues relating to the petitioner's qualifications to have his license reinstated." Syl. pt. 2, *In re Brown*, 164 W.Va. 234, 262 S.E.2d 444 (1980).

Syl. pt. 2 - "A *de novo* standard applies to a review of the adjudicatory record made before the Committee on Legal Ethics of the West Virginia State Bar as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the Committee's recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the Committee's findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record." Syl. pt. 3, *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994).

Syl. pt. 3 - "The general rule for reinstatement is that a disbarred attorney in order to regain admission to the practice of law bears the burden of showing that he presently possesses the integrity, moral character and legal competence to resume the practice of law. To overcome the adverse effect of the previous disbarment, he must demonstrate a record of rehabilitation. In addition, the court must conclude that such reinstatement will not have a justifiable and substantial adverse effect on the public confidence in the administration of justice and in this regard the seriousness of the conduct leading to disbarment is an important consideration." Syllabus Point 1, *In re Brown*, 166 W.Va. 226, 273 S.E.2d 567 (1980).

Syl. pt. 4 - "Rehabilitation is demonstrated by a course of conduct that enables the court to conclude there is little likelihood that after such rehabilitation is completed and the applicant is readmitted to the practice of law he will engage in unprofessional conduct." Syllabus Point 2, *In re Brown*, 166 W.Va. 226, 273 S.E.2d 567 (1980).

**ATTORNEYS**

**Discipline** (continued)

**Reinstatement** (continued)

***Lawyer Disciplinary Board v. Vieweg***, (continued)

Syl. pt. 5 - Where a conflict exists between Disciplinary Counsel and the Hearing Panel Subcommittee of the Lawyer Disciplinary Board with regard to the recommendations concerning a petition for reinstatement to the practice of law or other disciplinary proceedings, Disciplinary Counsel shall notify the Hearing Panel Subcommittee of the existence of the conflict. If the conflict is not resolved in advance, the Hearing Panel Subcommittee shall have the right to representation by separate counsel before this Court upon review of the petition.

The Court noted the majority of witnesses at the hearing in petitioner's original home, even those detailing petitioner's past misdeeds, expressed either no opinion regarding reinstatement or said supervised practice would be acceptable. Witnesses who had observed petitioner more recently were supportive of reinstatement, including petitioner's most recent employers.

The Court also emphasized petitioner's forthrightness in admitting his past misdeeds and in completing federal probation. Further, his continual rehabilitation from alcoholism was substantially documented. Despite some hesitation regarding the public's confidence in the legal system, the Court ordered petitioner's reinstatement effective 1 January 1996 with the following conditions: five years supervised practice, continuation of AA, continuation of payment of past debts and the State Bar to monitor his practice.

**Reprimands**

***Lawyer Disciplinary Board v. Cunningham***, 464 S.E.2d 181 (1995) (Recht, J.)

See ATTORNEYS Discipline, Failure to settle personal injury matter, (p. 80) for discussion of topic.

**ATTORNEYS**

**Discipline** (continued)

**Subsequent to suspension**

***Office of Disciplinary Counsel v. Battistelli***, 465 S.E.2d 644 (1995) (Per Curiam)

See ATTORNEYS Suspension, Conditions subsequent to, (p. 128) for discussion of topic.

**Suspension from bankruptcy court**

***Lawyer Disciplinary Board v. Kohout***, No. 22629 (4/14/95) (Per Curiam)

See ATTORNEYS Discipline, Misrepresentation on bar application, (p. 84) for discussion of topic.

**Suspensions**

***Committee on Legal Ethics v. Clay***, No. 22265 (11/2/94) (Per Curiam)

See ATTORNEY Discipline, Neglect, (p. 85) for discussion of topic.

***Committee on Legal Ethics v. Farber***, 447 S.E.2d 602 (1994) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 95) for discussion of topic.

***Committee on Legal Ethics v. Karl***, 449 S.E.2d 277 (1994) (McHugh, J.)

See ATTORNEYS Discipline, Neglect, (p. 85) for discussion of topic.

***Committee on Legal Ethics v. Massie***, No. 22370 (10/31/94) (Per Curiam)

See ATTORNEYS Discipline, Drugs or alcohol (p. 68) for discussion of topic.

**ATTORNEYS**

**Discipline** (continued)

**Suspensions** (continued)

***Committee on Legal Ethics v. McCorkle***, 452 S.E.2d 377 (1994) (Cleckley, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 65) for discussion of topic.

***Lawyer Disciplinary Board v. Kohout***, No. 22629 (4/14/95) (Per Curiam)

See ATTORNEYS Discipline, Misrepresentation on bar application, (p. 84) for discussion of topic.

***Office of Disciplinary Counsel v. Battistelli***, 465 S.E.2d 644 (1995) (Per Curiam)

See ATTORNEYS Suspension, Conditions subsequent to, (p. 128) for discussion of topic.

***Office of Lawyer Disciplinary Counsel v. Karr***, No. 23024 (10/6/95) (Per Curiam)

See ATTORNEYS Incapacitation, Drugs or alcohol, (p. 109) for discussion of topic.

**Supervision**

***Lawyer Disciplinary Board v. Beveridge***, 459 S.E.2d 542 (1995) (Per Curiam)

See ATTORNEYS Discipline, Failure to respond to bar counsel, (p. 75) for discussion of topic.

**ATTORNEYS**

**Discipline** (continued)

**Witness' payment contingent on testimony**

***Committee on Legal Ethics v. Sheatsley***, 452 S.E.2d 75 (1994) (McHugh, J.)

Respondent's client suspected two of its agents of defrauding the company by receiving commissions when no sales had occurred. Upon their dismissal they filed Human Rights claims, as well as employment compensation claims.

After settlement with one of the fired agents, Mr. Clement, respondent met with him regarding the other agent's successful claim before the Human Rights Commission. Clement was paid by respondent's client and revealed that the other agent conspired with respondent's investigator to fake evidence.

Respondent thereupon moved to reopen the Human Rights case. Clement then began demanding more money. Respondent took Clement's deposition but was unsuccessful in serving him with a subpoena for the subsequent hearing. Clement did not appear and his deposition was submitted as evidence. The Committee alleged that respondent wrongfully participated in payment of money to a potential witness, in violation of DR 7-109(C).

Syl. pt. 1 - " ' "In a court proceeding initiated by the Committee on Legal Ethics of the West Virginia State Bar to annul the license of an attorney to practice law, the burden is on the Committee to prove, by full, preponderating and clear evidence, the charges contained in the Committee's complaint." Syl. Pt. 1 *Committee on Legal Ethics v. Pence*, W.Va., 216 S.E.2d 236 (1975). Syllabus Point 1, *Committee on Legal Ethics v. Walker*, 178 W.Va. 150, 358 S.E.2d 234 (1987)." Syl. pt. 1, *Committee on Legal Ethics v. Six*, 181 W.Va. 52, 380 S.E.2d 219 (1989).

Syl. pt. 2 - " ' "This Court is the final arbiter of legal ethics problems and must make the ultimate decisions about public reprimands, suspensions or annulments of attorneys' licenses to practice law." Syllabus Point 3, *Committee on Legal Ethics v. Blair*, 174 W.Va. 494, 327 S.E.2d 671 (1984).' Syl. pt. 1, *Committee on Legal Ethics v. Charonis*, 184 W.Va. 268, 400 S.E.2d 276 (1990)." Syl. pt. 1 *Committee on Legal Ethics v. Ikner*, 190 W.Va. 433, 438 S.E.2d 613 (1993).

**ATTORNEYS**

**Discipline** (continued)

**Witness' payment contingent on testimony** (continued)

***Committee on Legal Ethics v. Sheatsley***, (continued)

Syl. pt. 3 - Disciplinary Rule 7-109(C) of the *Code of Professional Responsibility*, effective through December 31, 1988, (which has substantively been incorporated into Rule 1.8(k) of the *Rules of Professional Conduct*, effective January 1, 1989) is violated when a lawyer acquiesces in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case. Therefore, when the *Committee on Legal Ethics of the West Virginia State Bar* proves by full, preponderating and clear evidence that a lawyer prepared an agreement that provided for the payment of compensation upon a favorable resolution of the case involving the lawyer's client and such agreement further reflected the possibility that the person to whom the compensation would be given may be a witness in that case, such lawyer is subject to appropriate disciplinary sanctions.

The Court found respondent clearly acquiesced in payment of money to a potential witness in exchange for favorable testimony. However, respondent's cooperation and honesty throughout the investigation were taken into account. Public reprimand and costs.

**Divorce action**

**Conflict of interest**

***Lawyer Disciplinary Board v. Printz***, 452 S.E.2d 720 (1994) (Per Curiam)

See ATTORNEYS Discipline, Conflict of interest, (p. 62) for discussion of topic.

## ATTORNEYS

### Emergency suspension

***Office of Disciplinary Counsel v. Battistelli***, 457 S.E.2d 652 (1995) (Workman, J.)

See ATTORNEYS Discipline, Emergency suspension, (p. 69) for discussion of topic.

### Ethics

***Committee on Legal Ethics v. Clay***, No. 22265 (11/2/94) (Per Curiam)

See ATTORNEY Discipline, Neglect, (p. 85) for discussion of topic.

***Committee on Legal Ethics v. Farber***, 447 S.E.2d 602 (1994) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 95) for discussion of topic.

***Committee on Legal Ethics v. Karl***, 449 S.E.2d 277 (1994) (McHugh, J.)

See ATTORNEYS Discipline, Neglect, (p. 85) for discussion of topic.

***Committee on Legal Ethics v. McCorkle***, 452 S.E.2d 377 (1994) (Cleckley, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 65) for discussion of topic.

***Committee on Legal Ethics v. Sheatsley***, 452 S.E.2d 75 (1994) (McHugh, J.)

See ATTORNEYS Discipline, Witness' payment contingent on testimony, (p. 104) for discussion of topic.

## ATTORNEYS

**Ethics** (continued)

***Lawyer Disciplinary Board v. Kohout***, No. 22629 (4/14/95) (Per Curiam)

See ATTORNEYS Discipline, Misrepresentation on bar application, (p. 84) for discussion of topic.

***Lawyer Disciplinary Board v. McCormick***, No. 22432 (2/17/95) (Per Curiam)

See ATTORNEYS Discipline, Record insufficient, (p. 93) for discussion of topic.

***Lawyer Disciplinary Board v. Taylor***, 451 S.E.2d 440 (1994) (Per Curiam)

See ATTORNEYS Discipline, Annulment, (p. 55) for discussion of topic.

**Incapacitation**

***Committee on Legal Ethics v. Holland***, No. 21992 (5/20/94) (Per Curiam)

The Investigative Panel of the Committee on Legal Ethics filed this petition pursuant to Art. VI, § 26(b) of the By-Laws of the West Virginia State Bar, allowing for temporary suspension of license for incapacitation. The matter was continued on two occasions.

Respondent has voluntarily undertaken therapy and reduced her practice under the supervision of another attorney.

Respondent's neuropsychologist believed respondent to be in little danger of any further difficulty. The Court noted that respondent had taken steps to correct the matters which necessitated the petition. Dismissed without prejudice.

## ATTORNEYS

### Incapacitation (continued)

***Committee on Legal Ethics v. Bunner***, No. 22331 (7/13/95) (Per Curiam)

Respondent was alleged to have misappropriated client funds, encouraged a client to avoid arrest, neglected cases, refused to refund fees, threatened violence to a clerk and failed to respond to an ethics complaint. Several attempts to reschedule an ethics hearing were unsuccessful.

On June 10, 1994 the Hearing Panel petitioned the Court for an impairment evaluation and an indefinite suspension. The Court ordered respondent to inactive status on July 8, 1994 and also ordered a psychiatric evaluation to determine her fitness to practice law. The issue of whether she was able to defend against these charges was not raised.

The evaluation found respondent was unable to function as an attorney. The Hearing Panel's recommendations raise the issue of whether respondent is able to practice law pursuant to Rule 3.23(a) of *Rules of Lawyer Disciplinary Procedure*; and whether she is able to defend herself pursuant to Rule 3.23(c). The Panel asserted it is possible to be unable to practice but able to defend.

The Court complained that the evaluation should have answered both questions but ordered the disciplinary proceedings delayed until respondent is able to practice law. Disciplinary proceedings will resume upon respondent's reinstatement.

### Drugs or alcohol

***Committee on Legal Ethics v. Massie***, No. 22370 (10/31/94) (Per Curiam)

See ATTORNEYS Discipline, Drugs or alcohol (p. 68) for discussion of topic.

**Incapacitation** (continued)

**Drugs or alcohol** (continued)

***Committee on Legal Ethics v. McCorkle***, 452 S.E.2d 377 (1994) (Cleckley, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 65) for discussion of topic.

***Office of Lawyer Disciplinary Counsel v. Karr***, No. 23024 (10/6/95) (Per Curiam)

Pursuant to Rule 3.23(a) of the *Rules of Lawyer Disciplinary Procedure* Office of Disciplinary Counsel brought action to suspend respondent's license indefinitely by reason of his addiction to alcohol. Respondent acknowledged his problem but claimed he had taken steps to ameliorate the problem and offered to accept a reasonable period of supervision by another attorney.

The Court noted immediate action can be taken under Rule 3.27 if a "substantial threat of irreparable harm to the public" exists. Notice must be given and a hearing held within 30 days. However, under Rule 3.23 the Court must "determine whether the lawyer is so disabled, including examination of the lawyer by such qualified medical experts as the Court shall direct;" then enter an order to suspend if it concludes the lawyer is impaired.

The Court found additional evidence necessary here; respondent was ordered to undergo an evaluation and be supervised by an attorney selected by Disciplinary Counsel. The Hearing Panel of the Lawyer Disciplinary Board is to conduct a hearing within six months of receipt of the evaluation.

**Rehabilitation**

***Committee on Legal Ethics v. Massie***, No. 22370 (10/31/94) (Per Curiam)

See ATTORNEYS Discipline, Drugs or alcohol (p. 68) for discussion of topic.

**ATTORNEYS**

**Incapacitation** (continued)

**Suspensions**

***Committee on Legal Ethics v. Farber***, 447 S.E.2d 602 (1994) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 95) for discussion of topic.

***Committee on Legal Ethics v. Massie***, No. 22370 (10/31/94) (Per Curiam)

See ATTORNEYS Discipline, Drugs or alcohol (p. 68) for discussion of topic.

***Committee on Legal Ethics v. McCorkle***, 452 S.E.2d 377 S.E.2d (1994) (Cleckley, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 65) for discussion of topic.

**Ineffective assistance**

**Standard for**

***Ronnie R. v. Trent***, 460 S.E.2d 499 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 367) for discussion of topic.

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 370) for discussion of topic.

**ATTORNEYS**

**Ineffective assistance** (continued)

**Standard for** (continued)

***State ex rel. Bess v. Legursky***, 465 S.E.2d 892 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 371) for discussion of topic.

***State ex rel. Daniel v. Legursky***, 465 S.E.2d 416 (1995) (Cleckley, J.)

See INEFFECTIVE ASSISTANCE Adequacy of investigation, (p. 362) for discussion of topic.

***State v. Miller***, 459 S.E.2d 114 (1995) (Cleckley, J.)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 374) for discussion of topic.

***State v. Wood***, 460 S.E.2d 771 (1995) (McHugh, C.J.)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 375) for discussion of topic.

**Investigation of facts**

**Adequacy of**

***State ex rel. Daniel v. Legursky***, 465 S.E.2d 416 (1995) (Cleckley, J.)

See INEFFECTIVE ASSISTANCE Adequacy of investigation, (p. 362) for discussion of topic.

**ATTORNEYS**

**Neglect**

***Lawyer Disciplinary Board v. Cunningham***, 464 S.E.2d 181 (1995) (Recht, J.)

See ATTORNEYS Discipline, Failure to settle personal injury matter, (p. 80) for discussion of topic.

**Professional responsibility**

***Committee on Legal Ethics v. Clay***, No. 22265 (11/2/94) (Per Curiam)

See ATTORNEY Discipline, Neglect, (p. 85) for discussion of topic.

***Office of Lawyer Disciplinary Counsel v. Karr***, No. 23024 (10/6/95) (Per Curiam)

See ATTORNEYS Incapacitation, Drugs or alcohol, (p. 109) for discussion of topic.

**Annulment**

***Committee on Legal Ethics v. Keenan***, 450 S.E.2d 787 (1994) McHugh, J.)

See ATTORNEYS Discipline, Failure to comply with terms of, (p. 71) for discussion of topic.

***Committee on Legal Ethics v. ReBrook***, No. 21975 (2/18/94) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 67) for discussion of topic.

***Committee on Legal Ethics v. Sydnor***, 450 S.E.2d 638 (1994) (Per Curiam)

See ATTORNEYS Discipline, Commission of crime, (p. 60) for discussion of topic.

**ATTORNEYS**

**Professional responsibility** (continued)

**Annulment** (continued)

***Lawyer Disciplinary Board v. Taylor***, 455 S.E.2d 569 (1995) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 67) for discussion of topic.

**Attorney/client relationship**

***Lawyer Disciplinary Board v. McGraw***, 461 S.E.2d 850 (1995) (McHugh, C.J.)

See ATTORNEYS Discipline, Attorney/client relationship, (p. 57) for discussion of topic.

**Conditions subsequent to suspension**

***Office of Disciplinary Counsel v. Battistelli***, 465 S.E.2d 644 (1995) (Per Curiam)

See ATTORNEYS Suspension, Conditions subsequent to, (p. 128) for discussion of topic.

**Conflict of interest**

***Lawyer Disciplinary Board v. Printz***, 452 S.E.2d 720 (1994) (Per Curiam)

See ATTORNEYS Discipline, Conflict of interest, (p. 62) for discussion of topic.

***Lawyer Disciplinary Board v. Simons***, No. 22442 (12/15/94) (Per Curiam)

See ATTORNEYS Discipline, Conflict of interest, (p. 64) for discussion of topic.

**ATTORNEYS**

**Professional responsibility** (continued)

**Conflict of interest** (continued)

***State ex rel. Tyler v. MacQueen***, 447 S.E.2d 289 (1994) (Workman, J.)

See PROSECUTING ATTORNEYS Disqualification, Prior relationship with accused, (p. 552) for discussion of topic.

**Continuing education**

***W.Va. Continuing Legal Education Commission v. Carbone, et al.***, No. 22693 (3/24/95) (Per Curiam)

See ATTORNEYS Discipline, Continuing education requirements, (p. 65) for discussion of topic.

**Conviction of crimes**

***Committee on Legal Ethics v. McCorkle***, 452 S.E.2d 377 (1994) (Cleckley, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 65) for discussion of topic.

***State v. Sloan***, 442 S.E.2d 724 (1994) (Per Curiam)

See ATTORNEYS Discipline, Commission of crime, (p. 61) for discussion of topic.

***Committee on Legal Ethics v. Sydnor***, 450 S.E.2d 638 (1994) (Per Curiam)

See ATTORNEYS Discipline, Commission of crime, (p. 60) for discussion of topic.

**ATTORNEYS**

**Professional responsibility** (continued)

**Conviction of crimes** (continued)

***Lawyer Disciplinary Board v. Taylor***, 455 S.E.2d 569 (1995) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 67) for discussion of topic.

**Drug or alcohol use**

***Committee on Legal Ethics v. Massie***, No. 22370 (10/31/94) (Per Curiam)

See ATTORNEYS Discipline, Drugs or alcohol (p. 68) for discussion of topic.

**Emergency suspension**

***Office of Disciplinary Counsel v. Battistelli***, 457 S.E.2d 652 (1995) (Workman, J.)

See ATTORNEYS Discipline, Emergency suspension, (p. 69) for discussion of topic.

**Failure to follow reinstatement plan**

***Committee on Legal Ethics v. Cunningham***, No. 21717 (2/17/94) (Per Curiam)

See ATTORNEYS Discipline, Failure to follow reinstatement plan, (p. 72) for discussion of topic.

***Committee on Legal Ethics v. Farber***, 447 S.E.2d 602 (1994) (Per Curiam)

See ATTORNEYS Discipline, Failure to follow reinstatement plan, (p. 73) for discussion of topic.

**ATTORNEYS**

**Professional responsibility** (continued)

**Failure to follow reinstatement plan** (continued)

***Committee on Legal Ethics v. Martin***, No. 20859 (2/18/94) (Per Curiam)

See ATTORNEYS Discipline, Failure to follow reinstatement plan, (p. 74) for discussion of topic.

**Failure to prepare final order**

***Committee on Legal Ethics v. Simmons***, No. 22131 (5/20/93) (Per Curiam)

See ATTORNEYS Discipline, Failure to follow reinstatement plan, (p. 74) for discussion of topic.

**Failure to respond to bar counsel**

***Committee on Legal Ethics v. Clay***, No. 22265 (11/2/94) (Per Curiam)

See ATTORNEY Discipline, Neglect, (p. 85) for discussion of topic.

***Lawyer Disciplinary Board v. Beveridge***, 459 S.E.2d 542 (1995) (Per Curiam)

See ATTORNEYS Discipline, Failure to respond to bar counsel, (p. 75) for discussion of topic.

***Lawyer Disciplinary Board v. Taylor***, 451 S.E.2d 440 (1994) (Per Curiam)

See ATTORNEYS Discipline, Annulment, (p. 55) for discussion of topic.

**ATTORNEYS**

**Professional responsibility** (continued)

**Failure to respond to bar counsel** (continued)

***Lawyer Disciplinary Board v. Friedman***, 452 S.E.2d 449 (1994) (Per Curiam)

See ATTORNEYS Discipline, Failure to respond to bar counsel, (p. 78) for discussion of topic.

**Failure to rule on estate**

***Committee on Legal Ethics v. Fletcher***, No. 22132 (5/20/94) (Per Curiam)

See ATTORNEYS Discipline, Failure to rule on estate, (p. 80) for discussion of topic.

**Misconduct in another jurisdiction**

***Committee on Legal Ethics v. Goodman***, 441 S.E.2d 382 (1994) (Per Curiam)

See ATTORNEYS Discipline, Misconduct in another jurisdiction, (p. 82) for discussion of topic.

**Misrepresentation on bar application**

***Lawyer Disciplinary Board v. Kohout***, No. 22629 (4/14/95) (Per Curiam)

See ATTORNEYS Discipline, Misrepresentation on bar application, (p. 84) for discussion of topic.

**Mitigating factors**

***Committee on Legal Ethics v. Farber***, 447 S.E.2d 602 (1994) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 95) for discussion of topic.

**ATTORNEYS**

**Professional responsibility** (continued)

**Neglect**

***Committee on Legal Ethics v. Karl***, 449 S.E.2d 277 (1994) (McHugh, J.)

See ATTORNEYS Discipline, Neglect, (p. 85) for discussion of topic.

**Overcharging in workers' compensation**

***Committee on Legal Ethics v. Burdette***, 445 S.E.2d 733 (1994) Per Curiam

See ATTORNEYS Discipline, Overcharging in workers' compensation, (p. 89) for discussion of topic.

**Prior discipline**

***Lawyer Disciplinary Board v. Taylor***, 451 S.E.2d 440 (1994) (Per Curiam)

See ATTORNEYS Discipline, Annulment, (p. 55) for discussion of topic.

**Prohibition against ethics proceeding**

***State ex rel. Scales v. Committee on Legal Ethics***, 446 S.E.2d 729 (1994) (Per Curiam)

See PROHIBITION Ethics proceedings, (p. 534) for discussion of topic.

**Public reprimand**

***Committee on Legal Ethics v. Sheatsley***, 452 S.E.2d 75 (1994) (McHugh, J.)

See ATTORNEYS Discipline, Witness' payment contingent on testimony, (p. 104) for discussion of topic.

**ATTORNEYS**

**Professional responsibility** (continued)

**Public reprimand** (continued)

***Lawyer Disciplinary Board v. Friedman***, 452 S.E.2d 449 (1994) (Per Curiam)

See ATTORNEYS Discipline, Failure to respond to bar counsel, (p. 78) for discussion of topic.

**Real estate releases not filed**

***Committee on Legal Ethics v. Shingleton***, No. 22171 (5/20/94) (Per Curiam)

See ATTORNEYS Discipline, Real estate release not filed, (p. 92) for discussion of topic.

**Record insufficient**

***Lawyer Disciplinary Board v. McCormick***, No. 22432 (2/17/95) (Per Curiam)

See ATTORNEYS Discipline, Record insufficient, (p. 93) for discussion of topic.

**Rehabilitation**

***Committee on Legal Ethics v. Farber***, 447 S.E.2d 602 (1994) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 95) for discussion of topic.

***Committee on Legal Ethics v. Massie***, No. 22370 (10/31/94) (Per Curiam)

See ATTORNEYS Discipline, Drugs or alcohol (p. 68) for discussion of topic.

**ATTORNEYS**

**Professional responsibility** (continued)

**Rehabilitation** (continued)

***Lawyer Disciplinary Board v. Pence***, 461 S.E.2d 114 (1995) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 97) for discussion of topic.

***Lawyer Disciplinary Board v. Vieweg***, 461 S.E.2d 60 (1995) (Cleckley, J.)

See ATTORNEYS Discipline, Reinstatement, (p. 99) for discussion of topic.

**Reinstatement**

***Committee on Legal Ethics v. Berzito***, No. 22201 (7/15/94) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 94) for discussion of topic.

***Committee on Legal Ethics v. Farber***, 447 S.E.2d 602 (1994) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 95) for discussion of topic.

***Committee on Legal Ethics v. Massie***, No. 22370 (10/31/94) (Per Curiam)

See ATTORNEYS Discipline, Drugs or alcohol (p. 68) for discussion of topic.

***Lawyer Disciplinary Board v. Pence***, 461 S.E.2d 114 (1995) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 97) for discussion of topic.

***Lawyer Disciplinary Board v. Vieweg***, 461 S.E.2d 60 (1995) (Cleckley, J.)

See ATTORNEYS Discipline, Reinstatement, (p. 99) for discussion of topic.

**ATTORNEYS**

**Professional responsibility** (continued)

**Reprimands**

***Lawyer Disciplinary Board v. Cunningham***, 464 S.E.2d 181 (1995) (Recht, J.)

See ATTORNEYS Discipline, Failure to settle personal injury matter, (p. 80) for discussion of topic.

**Suspensions**

***Committee on Legal Ethics v. Farber***, 447 S.E.2d 602 (1994) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 95) for discussion of topic.

***Committee on Legal Ethics v. Massie***, No. 22370 (10/31/94) (Per Curiam)

See ATTORNEYS Discipline, Drugs or alcohol (p. 68) for discussion of topic.

***Lawyer Disciplinary Board v. Beveridge***, 459 S.E.2d 542 (1995) (Per Curiam)

See ATTORNEYS Discipline, Failure to respond to bar counsel, (p. 75) for discussion of topic.

**Rehabilitation**

***Lawyer Disciplinary Board v. Pence***, 461 S.E.2d 114 (1995) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 97) for discussion of topic.

***Lawyer Disciplinary Board v. Vieweg***, 461 S.E.2d 60 (1995) (Cleckley, J.)

See ATTORNEYS Discipline, Reinstatement, (p. 99) for discussion of topic.

## ATTORNEYS

### Reinstatement

***Lawyer Disciplinary Board v. Pence***, 461 S.E.2d 114 (1995) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 97) for discussion of topic.

***Lawyer Disciplinary Board v. Vieweg***, 461 S.E.2d 60 (1995) (Cleckley, J.)

See ATTORNEYS Discipline, Reinstatement, (p. 99) for discussion of topic.

### Prosecuting

#### Authorization for special prosecutor

***State v. Crouch***, 445 S.E.2d 213 (1994) (Neely, J.)

See PROSECUTING ATTORNEYS Special prosecutor, Authorization for, (p. 556) for discussion of topic.

#### Comments at trial

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 544) for discussion of topic.

#### Comments during opening or closing argument

***State v. Hottinger***, 461 S.E.2d 462 (1995) (Per Curiam)

See PROSECUTING ATTORNEYS Duty, Generally, (p. 553) for discussion of topic.

**Prosecuting** (continued)

**Comments during opening or closing argument** (continued)

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 548) for discussion of topic.

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 549) for discussion of topic.

**Conduct at trial**

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 549) for discussion of topic.

**Conflict of interest**

***State ex rel. Tyler v. MacQueen***, 447 S.E.2d 289 (1994) (Workman, J.)

See PROSECUTING ATTORNEYS Disqualification, Prior relationship with accused, (p. 552) for discussion of topic.

**Conflict with private practice**

***State ex rel. Tyler v. MacQueen***, 447 S.E.2d 289 (1994) (Workman, J.)

See PROSECUTING ATTORNEYS Disqualification, Prior relationship with accused, (p. 552) for discussion of topic.

**Prosecuting** (continued)

**Disqualification of office**

***State ex rel. Tyler v. MacQueen***, 447 S.E.2d 289 (1994) (Workman, J.)

See PROSECUTING ATTORNEYS Disqualification, Prior relationship with accused, (p. 552) for discussion of topic.

**Failure to prepare final order**

***Committee on Legal Ethics v. Simmons***, No. 22131 (5/20/93) (Per Curiam)

See ATTORNEYS Discipline, Failure to follow reinstatement plan, (p. 74) for discussion of topic.

**Forfeiture**

***Lawrence Frail v. $24,900, Palmero and Rivera***, 453 S.E.2d 307 (1994) (Miller, J.)

See FORFEITURE Probable cause required, (p. 308) for discussion of topic.

***Committee on Legal Ethics v. Fletcher***, No. 22132 (5/20/94) (Per Curiam)

See ATTORNEYS Discipline, Failure to rule on estate, (p. 80) for discussion of topic.

***Committee on Legal Ethics v. Shingleton***, No. 22171 (5/20/94) (Per Curiam)

See ATTORNEYS Discipline, Real estate release not filed, (p. 92) for discussion of topic.

**ATTORNEYS**

**Prosecuting** (continued)

**Forfeiture** (continued)

***Committee on Legal Ethics v. Simmons***, No. 22131 (5/20/93) (Per Curiam)

See ATTORNEYS Discipline, Failure to follow reinstatement plan, (p. 74) for discussion of topic.

**Suspensions**

***Committee on Legal Ethics v. McCorkle***, 452 S.E.2d 377 (1994) (Cleckley, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 65) for discussion of topic.

**Public official**

***Lawyer Disciplinary Board v. McGraw***, 461 S.E.2d 850 (1995) (McHugh, C.J.)

See ATTORNEYS Discipline, Attorney/client relationship, (p. 57) for discussion of topic.

**Public reprimand**

***Committee on Legal Ethics v. Cunningham***, No. 21717 (2/17/94) (Per Curiam)

See ATTORNEYS Discipline, Failure to follow reinstatement plan, (p. 72) for discussion of topic.

***Committee on Legal Ethics v. Sheatsley***, 452 S.E.2d 75 (1994) (McHugh, J.)

See ATTORNEYS Discipline, Witness' payment contingent on testimony, (p. 104) for discussion of topic.

**Public reprimand** (continued)

***Lawyer Disciplinary Board v. Friedman***, 452 S.E.2d 449 (1994) (Per Curiam)

See ATTORNEYS Discipline, Failure to respond to bar counsel, (p. 78) for discussion of topic.

***Lawyer Disciplinary Board v. McCormick***, No. 22432 (2/17/95) (Per Curiam)

See ATTORNEYS Discipline, Record insufficient, (p. 93) for discussion of topic.

***Lawyer Disciplinary Board v. McGraw***, 461 S.E.2d 850 (1995) (McHugh, C.J.)

See ATTORNEYS Discipline, Attorney/client relationship, (p. 57) for discussion of topic.

**Reinstatement**

***Committee on Legal Ethics v. Berzito***, No. 22201 (7/15/94) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 94) for discussion of topic.

***Committee on Legal Ethics v. Farber***, 447 S.E.2d 602 (1994) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 95) for discussion of topic.

***Committee on Legal Ethics v. Massie***, No. 22370 (10/31/94) (Per Curiam)

See ATTORNEYS Discipline, Drugs or alcohol (p. 68) for discussion of topic.

## ATTORNEYS

### Reprimands

***Lawyer Disciplinary Board v. Cunningham***, 464 S.E.2d 181 (1995) (Recht, J.)

See ATTORNEYS Discipline, Failure to settle personal injury matter, (p. 80) for discussion of topic.

### Standard for review

#### Remarks by prosecuting attorney

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 548) for discussion of topic.

### Suspension

***Committee on Legal Ethics v. Burdette***, 445 S.E.2d 733 (1994) (Per Curiam)

See ATTORNEYS Discipline, Overcharging in workers' compensation, (p. 89) for discussion of topic.

***Committee on Legal Ethics v. Clay***, No. 22265 (11/2/94) (Per Curiam)

See ATTORNEY Discipline, Neglect, (p. 85) for discussion of topic.

***Committee on Legal Ethics v. Farber***, 447 S.E.2d 602 (1994) (Per Curiam)

See ATTORNEYS Discipline, Failure to follow reinstatement plan, (p. 73) for discussion of topic.

**ATTORNEYS**

**Suspension** (continued)

***Committee on Legal Ethics v. Farber***, 447 S.E.2d 602 (1994) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 95) for discussion of topic.

***Committee on Legal Ethics v. Karl***, 449 S.E.2d 277 (1994) (McHugh, J.)

See ATTORNEYS Discipline, Neglect, (p. 85) for discussion of topic.

***Committee on Legal Ethics v. McCorkle***, 452 S.E.2d 377 (1994) (Cleckley, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 65) for discussion of topic.

**Conditions subsequent to**

***Office of Disciplinary Counsel v. Battistelli***, 465 S.E.2d 644 (1995) (Per Curiam)

The Court ordered respondent's license suspended for two years and nine months pending resolution of underlying complaints. See *Office of Disciplinary Counsel v. Battistelli*, 193 W.Va. 652, 457 S.E.2d 652 (1995); see also, *Committee on Legal Ethics v. Battistelli*, 185 W.Va. 109, 405 S.E.2d 242 (1991). Disciplinary Counsel claimed that respondent engaged in practicing law while working as a paralegal during the suspension.

Respondent and Disciplinary Counsel previously entered an agreement entitled "*Stipulated Findings of Fact, Conclusions of Law, Mitigation and Recommended Discipline*" in which respondent admitted violations in fourteen complaints and agreed to the suspension herein. The Court adopted this agreement on 14 September 1995. Respondent's clients were notified by letter of his change of status and respondent's supervising attorney advised that respondent should not have contact with clients. Despite these precautions, a prospective client claimed respondent held himself out to be an attorney and gave legal advice. Respondent denied the allegations.

**Suspension** (continued)

**Conditions subsequent to** (continued)

***Office of Disciplinary Counsel v. Battistelli***, (continued)

Syl. pt. - "A *de novo* standard to a review of the adjudicatory record made before the Committee on Legal Ethics of the West Virginia State Bar as to questions of law, questions of application of the law to the facts, and questions of appropriate sanctions; this Court gives respectful consideration to the Committee's recommendations while ultimately exercising its own independent judgment. On the other hand, substantial deference is given to the Committee's findings of fact, unless such findings are not supported by reliable, probative, and substantial evidence on the whole record." Syl. pt. 3, *Committee on Legal Ethics v. McCorkle*, 192 W.Va. 286, 452 S.E.2d 377 (1994).

The Court noted that the facts were in dispute and remanded to the Lawyer Disciplinary Board. The Court also amended the prior suspension order to prohibit respondent from client contact.

**Continuing education not met**

***W.Va. Continuing Legal Education Commission v. Carbone, et al.***, No. 22693 (3/24/95) (Per Curiam)

See ATTORNEYS Discipline, Continuing education requirements, (p. 65) for discussion of topic.

**Drugs or alcohol**

***Office of Lawyer Disciplinary Counsel v. Karr***, No. 23024 (10/6/95) (Per Curiam)

See ATTORNEYS Incapacitation, Drugs or alcohol, (p. 109) for discussion of topic.

**ATTORNEYS**

**Suspension** (continued)

**Emergency suspension**

***Office of Disciplinary Counsel v. Battistelli***, 457 S.E.2d 652 (1995) (Workman, J.)

See ATTORNEYS Discipline, Emergency suspension, (p. 69) for discussion of topic.

**Reinstatement**

***Committee on Legal Ethics v. Farber***, 447 S.E.2d 602 (1994) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 95) for discussion of topic.

**Reinstatement following**

***Committee on Legal Ethics v. Farber***, 447 S.E.2d 602 (1994) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 95) for discussion of topic.

**Subsequent annulment**

***Committee on Legal Ethics v. Keenan***, 450 S.E.2d 787 (1994) McHugh, J.)

See ATTORNEYS Discipline, Failure to comply with terms of, (p. 71) for discussion of topic.

**Supervision**

***Lawyer Disciplinary Board v. Beveridge***, 459 S.E.2d 542 (1995) (Per Curiam)

See ATTORNEYS Discipline, Failure to respond to bar counsel, (p. 75) for discussion of topic.

**ATTORNEYS**

**Suspension from bankruptcy court**

**Effect of on bar license**

***Lawyer Disciplinary Board v. Kohout***, No. 22629 (4/14/95) (Per Curiam)

See ATTORNEYS Discipline, Misrepresentation on bar application, (p. 84) for discussion of topic.

**Zealous advocacy**

**Failure to engage in**

***State ex rel. Bess v. Legursky***, 465 S.E.2d 892 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 371) for discussion of topic.

**BAILIFF**

**Witness at trial**

***State v. Kelley***, 451 S.E.2d 425 (1994) (McHugh, J.)

See WITNESSES  Bailiff as witness, (p. 707) for discussion of topic.

## BURDEN OF PROOF

### Generally

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See HOMICIDE Sufficiency of evidence, (p. 342) for discussion of topic.

### Insanity

***State v. Walls***, 445 S.E.2d 515 (1994) (Per Curiam)

See INSANITY Presumptions, (p. 377) for discussion of topic.

### Murder

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See HOMICIDE Sufficiency of evidence, (p. 342) for discussion of topic.

***State v. Richards***, 466 S.E.2d 395 (1995) (Per Curiam)

See PLAIN ERROR Generally, (p. 503) for discussion of topic.

### Witness unavailable

***State v. Mason***, 460 S.E.2d 36 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Extrajudicial statements, (p. 226) for discussion of topic.

***State v. Shepherd***, 442 S.E.2d 440 (1994) (Per Curiam)

Appellant was found guilty of malicious wounding involving an altercation at a bar. One of the "bouncers" at the bar testified at the preliminary hearing but did not testify at trial; the preliminary hearing testimony was admitted.

**BURDEN OF PROOF**

**Witness unavailable** (continued)

***State v. Shepherd***, (continued)

Syl. pt. 1 - "In order to satisfy its burden of showing that the witness is unavailable, the State must prove that it has made a good-faith effort to obtain the witness's attendance at trial. This showing necessarily requires substantial diligence." Syl. pt. 3, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

Syl. pt. 2 - "Where there is a lack of evidence in the record demonstrating the State's good-faith efforts to secure the witness for trial, the prosecution has failed to carry its burden of proving unavailability." Syl. pt. 4, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

The Court noted the prosecution had attempted to subpoena the witness for previous trial dates (the trial was continued three times) but did not issue a subpoena for the final date. Reversed and remanded.

## CHILD CUSTODY

### Case plan for child

***In the Matter of Brian D. v. Nanny***, 461 S.E.2d 129 (1995) (Workman, J.)

See ABUSE AND NEGLECT Improvement period, Case plan required, (p. 6) for discussion of topic.

***State ex rel. S.C. v. Chafin***, 444 S.E.2d 62 (1994) (McHugh, J.)

Petitioner, a juvenile, sought a writ of habeas corpus to compel her release from a psychiatric facility; and writ of mandamus to require a case plan From DHHR (including permanent disposition); to limit DHHR to no more than sixty days of temporary custody; to require DHHR to file a petition for review if no permanent placement is made within twelve months; and to file a report with the court when a child receives more than three placements in one year, all as required by statute. See *W.Va. Code*, 49-6-3(b), 5(a), 8(a) and 8(d).

Petitioner had been emotionally and physically abused by her mother; and sexually abused by her mother's boyfriend and the boyfriend's son. On August 27, 1991 DHHR was given temporary custody; on August 28, 1991 she was placed in an emergency shelter. On November 8, 1991 she was sent to her grandmother on a trial basis; when she did not attend school she was sent to another shelter, then returned to the first shelter on December 13, 1991. On January 2, 1992 she was admitted to a hospital following a suicide attempt, placed at a treatment center, then on March 18, 1992 a youth home, on May 5, 1992, another youth home and on March 18, 1993, placed in a foster home. At her request, she was sent to another youth home on March 30, 1993.

Following disruptive behavior at the group home, S.C. was adjudged a status offender on July 29, 1993 pursuant to *W.Va. Code*, 49-1-4. No hearing was held, S.C. was not represented by counsel and she was not present at the determination. The order directed DHHR to retain temporary custody and to send S.C. to the treatment center, where she was placed July 30, 1993. The director of the last group home protested that S.C. did not receive due process; that she was showing improvement at the home; and that her *guardian ad litem* was given erroneous information. Following filing of this petition, S.C. was released and returned to the home.

**Case plan for child** (continued)

***State ex rel. S.C. v. Chafin***, (continued)

A preliminary hearing was held September 5, 1991 which determined that imminent danger existed to all four children in S.C.' S household. Although a final hearing was scheduled for October 31, 1991, it was rescheduled for January 14, 1992, at which time a continuance was granted until February 13, 1992 to allow for psychiatric testing. On February 13, 1992, sua sponte, the court then continued the case until June 26, 1992.

Following yet another continuance at the request of S.C.' S *guardian ad litem*, by order of August 6, 1992, S.C.' S mother's parental rights were terminated. No hearing was ever held regarding permanent custody.

Syl. pt. 1 - *W.Va. Code*, 49-6-3(b) [1992] provides that whether or not the court orders immediate transfer of custody as provided in *W.Va. Code*, 49-6-3(a) [1992], if the court finds that there exists imminent danger to the child, the court may schedule a preliminary hearing. If at the preliminary hearing the court finds there to be no alternative less drastic than removal of the child from his or her home, the court may order that the child be delivered into the temporary custody of the Department of Health and Human Resources or some other designated person for a period not exceeding sixty days. Furthermore, if, pursuant to *W.Va. Code*, 49-6-2 [1992], the court finds the child to be abused or neglected, then both the Department of Health and Human Resources and the court, no later than sixty days after the child is placed in the temporary custody of the Department of Health and Human Resources, are to proceed with the disposition of the child, in compliance with *W.Va. Code*, 49-6-5 [1992]. *W.Va. Code*, 49-6-5(a) [1992] requires the Department of Human Resources to file with the court a copy of the child's case plan, including the permanency plan for the child. *W.Va. Code*, 49-6-5(a) [1992] defines a case plan as a written document which includes, where applicable, the requirements of a family case plan, as set forth in *W.Va. Code*, 49-6D-3 [1984], as well as the additional requirements set forth in *W.Va. Code*, 49-6-5(a) [1992]. Furthermore, *W.Va. Code*, 49-6-5(a) [1992] requires the court to proceed to disposition, one of those being, if the court finds the abusing parent(s) unwilling or unable to provide adequately for the child's needs, the court may commit the child temporarily to the custody of the Department of Health and Human Resources.

**Case plan for child** (continued)

***State ex rel. S.C. v. Chafin***, (continued)

Syl. pt. 2 - *W.Va. Code*, 49-6-8(a) [1992] provides that if, twelve months after receiving physical custody of a child, the Department of Health and Human Resources has not placed the child in permanent foster care, in an adoptive home or with a natural parent, the Department of Health and Human Resources shall file with the circuit court a petition for review of the case as well as a report detailing the efforts which have been made to place the child in a permanent home and copies of the child's case plan including the permanency plan. *W.Va. Code*, 49-6-8(a) [1992] further requires the circuit court to schedule a hearing to review the child's case, to determine whether under what conditions the child's commitment to the Department of Health and Human Resources shall continue, and to determine what efforts are necessary to provide the child with a permanent home. At the conclusion of the hearing the circuit court shall enter an appropriate order of disposition, in accordance with the best interests of the child. Under *W.Va. Code*, 49-6-8(a) [1992], the court shall retain continuing jurisdiction over cases reviewed under this section for so long as a child remains in temporary foster care.

Syl. pt. 3 - "The purpose of the family case plan as set out in *W.Va. Code*, 49-6D-3(a) (1984), is to clearly set forth an organized, realistic method of identifying family problems and the logical steps to be used in resolving or lessening these problems." Syl. pt. 5, *State ex rel. Dept. of H.S. v. Cheryl M.*, 177 W.Va. 688, 356 S.E.2d 181 (1987).

Syl. pt. 4 - The purpose of the Child's case plan is the same as the family case plan, except that the focus of the child's case plan is on the child rather than the family unit. The child's case plan is to include, where applicable, the requirements of a family case plan, as set forth in *W.Va. Code*, 49-6-5(a) [1992] and 49-6D-3(a) [1984], as well as the additional requirements articulated in *W.Va. Code*, 49-6-5(a).

Syl. pt. 5 - *W.Va. Code*, 49-6-8(d) [1992] requires the Department of Health and Human Resources to file a report with the circuit court in any case where any child in the temporary or permanent custody of the Department of Health and Human Resources receives more than three placements in one year no later than thirty days after the third placement.

## CHILD CUSTODY

**Case plan for child** (continued)

***State ex rel. S.C. v. Chafin***, (continued)

Syl. pt. 6 - " 'A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect.' Syl. pt. 2, *State v. Epperly*, 135 W.Va. 877, 65 S.E.2d 488 (1951)." Syl. pt. 3, *Echard v. Holland*, 177 W.Va. 138, 351 S.E.2d 51 (1986).

The Court found DHHR had failed to comply with the statutory requirements. Because of the complexity of complying with the statutes, the Court required a progress report by October 1, 1994. Writ of habeas corpus denied (S.C. was released when the petition was filed); writ of mandamus granted.

**Fit caretaker defined**

***Dancy v. Dancy***, 447 S.E.2d 883 (1994) (Per Curiam)

(**NOTE**: although brought as a divorce action, this case is included so as to be a guide for cases involving termination of parental rights.)

Terry Dancy was denied permanent custody of his eleven year old daughter. Betty Dancy, the child's mother, has complied with DHHR's plan to rehabilitate herself from alcoholism.

While in her mother's care, the child did well in school but was frequently absent. Mrs. Dancy instructed the school to send her daughter to a friend's house after school; she claimed it allowed the child more play time and also claimed that she was waiting for her daughter at the house.

Following Mrs. Dancy's relapse into alcoholism, DHHR filed a petition seeking temporary custody, which petition was granted. Terry Dancy was awarded temporary physical custody. While in her father's care the child missed less school and was evaluated as well-adjusted and without a strong preference as to which parent she lived with. After the mother complied with DHHR's service plan, DHHR's petition was dismissed and permanent custody awarded to her. Throughout the multiple hearings, the circuit court referred the matter to a family law master and affirmed the master's decisions.

## CHILD CUSTODY

### Fit caretaker defined (continued)

***Dancy v. Dancy***, (continued)

Syl. pt. 1 - "To be considered fit, the primary caretaker parent must: (1) feed and clothe the child appropriately; (2) adequately supervise the child and protect him or her from harm; (3) provide habitable housing; (4) avoid extreme discipline, child abuse, and other similar vices; and (5) refrain from immoral behavior under circumstances that would affect the child. In this last regard, restrained normal sexual behavior does not make a parent unfit." Syllabus Point 5, *David M. v. Margaret M.*, 182 W.Va. 57, 385 S.E.2d 912 (1989).

Syl. pt. 2 - " 'The exercise of discretion by a trial court in awarding custody of a minor child will not be disturbed on appeal unless that discretion has been abused: however, where the trial court's ruling does not reflect a discretionary decision but is based upon an erroneous application of the law and is clearly wrong, the ruling will be reversed on appeal.' Syllabus Point 2, *Funkhouser v. Funkhouser*, 158 W.Va. 964, 216 S.E.2d 570 (1975)." Syllabus Point 1, *David M. v. Margaret M.*, 182 W.Va. 57, 385 S.E.2d 912 (1989).

The Court found the trial court's decision reasonable. No abuse of discretion. Affirmed.

### Improvement period

#### Custody during

***In the Interest of Renae Ebony***, 452 S.E.2d 737 (1994) (Workman, J.)

See CHILD CUSTODY Temporary custody, (p. 140) for discussion of topic.

## CHILD CUSTODY

### Permanent custody

#### Case plan for child

***State ex rel. S.C. v. Chafin***, 444 S.E.2d 62 (1994) (McHugh, J.)

See CHILD CUSTODY Case plan for child, (p. 135) for discussion of topic.

### Standard for determining

***State ex rel. David Allen B. v. Sommerville***, 459 S.E.2d 363 (1995) (Recht, J.)

See PATERNITY Blood tests, When required, (p. 495) for discussion of topic.

### Temporary custody

***In the Interest of Renae Ebony***, 452 S.E.2d 737 (1994) (Workman, J.)

Appellant here was Renae Ebony's *guardian ad litem*. He questioned the propriety of the circuit court's granting a three month in-home improvement period following an emergency removal of the child.

Both parents are low-functioning and mentally impaired. The child was found living in a two bedroom apartment with as many as seven other people. According to the complainant, the child's paternal grandmother, the mother had been heard cussing the baby, calling her a "bitch" and had been seen shaking the baby.

The mother was sent to learn better parenting skills; she attended classes for two weeks but did not return as scheduled. The initial petition was filed, resulting in the temporary custody of DHHR pursuant to an emergency taking. Following a hearing, the circuit court refused to ratify the taking and dismissed the case. During a rehearing upon petition of DHHR, the circuit court ratified the taking but allowed custody to remain with the parents.

**Temporary custody** (continued)

***In the Interest of Renae Ebony***, (continued)

Syl. pt. - Where a child is initially removed from the custody of his or her parents pursuant to West Virginia Code § 49-6-3 (Supp. 1994), and where such emergency taking is subsequently ratified on the basis of a finding of imminent danger, the child shall remain in the temporary legal and physical custody of the State or some responsible relative within the meaning of West Virginia Code § 49-6-3 and out of the alleged abusive home during the improvement period until the circumstances which constitute the imminent danger have ceased to exist, or the alleged abusing person has been precluded from residing in or visiting the home.

Finding that at least one improvement period is usually appropriate under *W.Va. Code*, 49-6-1, the Court noted *W.Va. Code*, 49-6-2(b) allows the trial court, within its discretion, to determine custody during that improvement period. Because the conditions which resulted in the initial petition were not shown to be alleviated, the Court ordered temporary custody to remain with DHHR that both the child's parents undergo counseling, and that a three-month improvement period be granted.

The status of the child and the parents' progress are to be monitored monthly. See *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991). Reversed and remanded.

**Case plan for child**

***State ex rel. S.C. v. Chafin***, 444 S.E.2d 62 (1994) (McHugh, J.)

See CHILD CUSTODY Case plan for child, (p. 135) for discussion of topic.

## CHILD CUSTODY

### Termination of parental rights

#### Improvement period

***State v. Jessica M.***, 445 S.E.2d 243 (1994) (Per Curiam)

See TERMINATION OF PARENTAL RIGHTS Abuse and neglect, Sufficiency to terminate, (p. 675) for discussion of topic.

## COLLATERAL CRIMES

### Admissibility

***State v. McGhee***, 455 S.E.2d 533 (1995) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 216) for discussion of topic.

***State v. McGinnis***, 455 S.E.2d 516 (1994) (Cleckley, J.)

See EVIDENCE Admissibility, Collateral crimes, (p. 218) for discussion of topic.

#### Generally

***State v. Farmer***, 445 S.E.2d 759 (1994) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 215) for discussion of topic.

### Instructions on

#### Other than accused

***State v. Malick***, 457 S.E.2d 482 (1995) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 215) for discussion of topic.

### Other than accused

***State v. Malick***, 457 S.E.2d 482 (1995) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 215) for discussion of topic.

## COLLATERAL ESTOPPEL

### Administrative agency proceeding

#### Effect on criminal matters

***State v. Miller***, 459 S.E.2d 114 (1995) (Cleckley, J.)

See COLLATERAL ESTOPPEL Issue preclusion defined, (p. 144) for discussion of topic.

### Generally

***State v. Miller***, 459 S.E.2d 114 (1995) (Cleckley, J.)

See COLLATERAL ESTOPPEL Issue preclusion defined, (p. 144) for discussion of topic.

### Issue preclusion defined

***State v. Miller***, 459 S.E.2d 114 (1995) (Cleckley, J.)

Appellant was convicted of battery. During her employment as a licensed practical nurse at Colin Anderson Center, she was observed slapping a male patient. The patient was twenty-four years old but with an I.Q. of 22 and an estimated mental age of three years and nine months.

Appellant testified at trial that she witnessed the patient bothering a sleeping female patient, known to have an "explosive personality." The primary witness claimed appellant struck the patient, sending him down onto a couch. Appellant was subsequently terminated from employment. She filed a grievance with the State Employees Grievance Board and received a favorable ruling stating that the employer failed to prove appellant engaged in patient abuse. The circuit court affirmed.

Appellant claimed on appeal that the administrative determination should be *res judicata* as to the criminal charges. The state argued that the administrative and criminal issues were not substantially the same; and that collateral estoppel cannot apply to the criminal action because of lack of privity between the employer and the prosecuting attorney.

## COLLATERAL ESTOPPEL

**Issue preclusion defined** (continued)

***State v. Miller***, (continued)

Syl. pt. 1 - Collateral estoppel will bar a claim if four elements are met: (1) The issue previously decided is identical to the one presented in the action in question; (2) there is a final adjudication on the merits of the prior action; (3) the party against whom the doctrine is invoked was a party or in privity with a party to a prior action; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.

Syl. pt. 2 - Relitigation of an issue is not precluded when a new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in two courts. Where the procedures available in the first court may have been tailored to the prompt, inexpensive determination of small claims, a compelling reason exists not to apply collateral estoppel.

Syl. pt. 3 - For purposes of issue preclusion, issues and procedures are not identical or similar if the second action involves application of a different legal standard or substantially different procedural rules, even though the factual settings of both suits may be the same.

Syl. pt. 4 - "For issue or claim preclusion to attach to quasi-judicial determinations of administrative agencies, at least where there is no statutory authority directing otherwise, the prior decision must be rendered pursuant to the agency's adjudicatory authority and the procedures employed by the agency must be substantially similar to those used in a court. In addition, the identicality of the issues litigated is a key component to the application of administrative *res judicata* or collateral estoppel." Syllabus Point 2, *Vest v. Board of Educ. of the County of Nicholas*, W.Va., __ S.E.2d __ (No. 22547) (2/17/95).

The Court found the Grievance Board without authority to resolve criminal matters (as it has no authority to resolve Human Rights Commission complaints. *Vest*, *supra*.) The Court also found the procedures substantially different: the Rules of Criminal Procedure do not apply in grievance proceedings; nor do Sixth Amendment protections of counsel; the right to speedy trial before an impartial jury; the right to be informed of the charges; the right to confront witnesses; and the right to compulsory process for obtaining witnesses.

## COLLATERAL ESTOPPEL

**Issue preclusion defined** (continued)

***State v. Miller***, (continued)

In addition, the issue of wrongful discharge from employment is different from whether one has committed battery. Factors can be raised in the former which are not applicable in criminal matters. Finally, no privity existed sufficient to apply collateral estoppel. Proving the same facts does not of itself establish privity. The state's interest in determining guilt or innocence is not served in an administrative proceeding. No error.

**Standard for determining**

***State v. Miller***, 459 S.E.2d 114 (1995) (Cleckley, J.)

See COLLATERAL ESTOPPEL Issue preclusion defined, (p. 144) for discussion of topic.

## COMPETENCY

### Insanity

#### Sufficiency of evidence

***State v. Walls***, 445 S.E.2d 515 (1994) (Per Curiam)

See INSANITY Presumptions, (p. 377) for discussion of topic.

### Right to psychiatric examination

***State v. Moore***, 457 S.E.2d 801 (1995) (Neely, J.)

See JUDGES Duties, To ascertain competency, (p. 411) for discussion of topic.

### Standard for

***State ex rel. Shamblin v. Collier***, 445 S.E.2d 736 (1994) (Workman, J.)

Petitioner sought original jurisdiction for writ of habeas corpus to dissolve the committee appointment of petitioner's daughter following a determination of his incompetency by the Jackson County Commission. Petitioner is eighty-five years old and claims to be able to handle his own affairs.

The notice of petition was served on petitioner in person and a copy delivered to his son. Petitioner is illiterate. Kennand L. Skeen was appointed *guardian ad litem*. Mr. Skeen stated he is appointed as guardian in most committee proceedings in Jackson County. The hearing before the County Commission was limited in both duration and scope; petitioner was not present.

Syl. pt. 1 - Because a finding of incompetency involves deprivation of an individual's exercise of liberty and property rights, a determination of incompetency under West Virginia Code § 27-11-1 (1992) cannot be summarily made; such finding must be reached through clear and convincing evidence.

**COMPETENCY**

**Standard for** (continued)

***State ex rel. Shamblin v. Collier***, (continued)

Syl. pt. 2 - The statutory requirements for making a determination of incompetency pursuant to West Virginia Code § 27-11-1 (1992) are not met simply by a showing of advanced age and past physical problems.

The transcript here demonstrated that the evidence presented was minimal. Mr. Skeen, based on one visit to petitioner, said petitioner knew his age, his children's names and the President of the United States but did not know the name of the care provider at his group home and had some difficulty with the date (although he did know what year it was). Mr. Skeen concluded based on petitioner's age, his illiteracy and his weight of ninety-four pounds that he was unable to manage his affairs.

Petitioner's daughter testified that her father gave her children $50 to $100 on occasion even though his income was $890 per month. She seemed primarily concerned about the cost of providing care for her father. She did not testify as to her father's physical condition. The petition referred to petitioner's use of oxygen but no evidence was adduced. The treating physician's affidavit consisted of three checked boxes on a form, stating that petitioner was unable to care for himself and unable to attend the hearing. No medical reasons were given.

The Court noted that other treating physicians found petitioner to be alert and oriented, with the capacity to make informed decisions. The Court agreed that deprivation of the liberty of caring for oneself should be accompanied by stringent procedural due process. The passage of *W.Va. Code*, 44A-1-1 *et seq*. now requires the circuit court to make determinations of incompetency and provides for specific procedural and substantive steps. Remanded to the Jackson County Circuit Court. Writ granted.

**COMPETENCY**

**Tests for**

**Judge's duty to order**

***State v. Moore***, 457 S.E.2d 801 (1995) (Neely, J.)

See JUDGES  Duties, To ascertain competency, (p. 411) for discussion of topic.

## CONDITIONS OF CONFINEMENT

### Civil rights violations

***Skaff v. Human Right Commission***, 444 S.E.2d 39 (1994) (Miller, J.)

See CONDITIONS OF CONFINEMENT Human Right Commission's authority, (p. 150) for discussion of topic.

### Generally

***Crain v. Bordenkircher***, 445 S.E.2d 730 (1994) (Per Curiam)

See PRISON/JAIL CONDITIONS Generally, (p. 520) for discussion of topic.

### Human Right Commission's authority

***Skaff v. Human Right Commission***, 444 S.E.2d 39 (1994) (Miller, J.)

The West Virginia Human Rights Commission held that it had jurisdiction to hear racial discrimination complaints because a prison is a "public accommodation" pursuant to *W.Va. Code*, 5-11-3(j). Appellants are persons responsible for the penal system.

Syl. pt. 1 - The State's penal institutions are not places of public accommodations under *W.Va. Code*, 5-11-3(j) (1992), for prisoners housed therein. Therefore, their claims of discrimination are not under the jurisdiction of the *West Virginia Human Rights Commission*.

Syl. pt. 2 - "A prisoner has a right, secured by the Eighth and Fourteenth Amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates, and he need not wait until he is actually assaulted to obtain relief. In order to meet the foregoing standard two conditions must be shown: (1) Whether there is a pervasive risk of harm to inmates from other prisoners, and if so, (2) whether the officials are exercising reasonable care to prevent prisoners from intentionally harming others or from creating an unreasonable risk of harm." Syllabus Point 2, *Hackl v. Dale*, 171 W.Va. 415, 299 S.E.2d 26 (1982).

## CONDITIONS OF CONFINEMENT

**Human Right Commission's authority** (continued)

***Skaff v. Human Right Commission***, (continued)

Syl. pt. 3 - "Ordinarily an action under 42 U.S.C.A. § 1983 is appropriate where complaint is made to the conditions of confinement and not its duration." Syllabus Point 1, *Mitchem v. Melton*, 167 W.Va. 21, 277 S.E.2d 895 (1981).

Syl. pt. 4 - "An action based on 42 U.S.C.A. § 1983 can be maintained in our State courts to challenge prison conditions." Syllabus Point 2, *Mitchem v. Melton*, 167 W.Va. 21, 277 S.E.2d 895 (1981).

The Court noted that criminal convictions curtail civil liberties generally available. Exclusion of the general public prevents prisons from being places of public accommodation. The Court recommended remedies of habeas corpus or 1983 as alternatives to state Human Rights Commission action. Reversed.

**Human Right Commission's jurisdiction**

***Skaff v. Human Right Commission***, 444 S.E.2d 39 (1994) (Miller, J.)

See CONDITIONS OF CONFINEMENT Human Right Commission's authority, (p. 150) for discussion of topic.

## CONFESSIONS

### Admissibility

***State v. Hopkins***, 453 S.E.2d 317 (1994) (Neely, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 602) for discussion of topic.

***State v. Jameson***, 461 S.E.2d 67 (1995) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 603) for discussion of topic.

### Reconsideration of

***State v. Buzzard***, 461 S.E.2d 50 (1995) Workman, J.)

See SEARCH AND SEIZURE Warrantless search, Consent to, (p. 584) for discussion of topic.

### Statements by third party

***State v. Mason***, 460 S.E.2d 36 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Extrajudicial statements, (p. 226) for discussion of topic.

### Warrantless search

***State v. Buzzard***, 461 S.E.2d 50 (1995) Workman, J.)

See SEARCH AND SEIZURE Warrantless search, Consent to, (p. 584) for discussion of topic.

## CONFESSIONS

### Prompt presentment

#### Delay in taking before magistrate

***State ex rel. Bess v. Legursky***, 465 S.E.2d 892 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 371) for discussion of topic.

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See JUVENILE Self-incrimination, Waiver of right to counsel, (p. 447) for discussion of topic.

### Voluntariness

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 597) for discussion of topic.

***State v. Farley***, 452 S.E.2d 50 (1994) (Cleckley, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 599) for discussion of topic.

***State v. Honaker***, 454 S.E.2d 96 (1994) (Cleckley, J.)

Appellant was convicted of first-degree murder and conspiracy to commit first-degree murder. At trial, Jerry Mahood testified that he and a friend killed appellant's stepson at her request. Jerry Mahood and appellant were having "an intimate relationship."

**Voluntariness** (continued)

***State v. Honaker***, (continued)

After Mr. Mahood was arrested appellant ingested 70 Excedrin P.M. and was taken to Jackson General Hospital. Hospital staff later testified that she made a number of voluntary statements not in response to any questions and not in the presence of police. The statements were, generally, that she loved and missed "Jerry;" that she paid for it; and that if she told the truth they would put her in jail.

Mr. Mahood testified that appellant seemed happy about her stepson's death. This testimony corroborated statements she made to police about being relieved regarding the death. Other potentially incriminating statements to other police and to two private investigators were introduced at trial.

Syl. pt. 1 - " ' " ' A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence.' Syllabus Point 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978)." Syl. Pt. 7, *State v. Hickman*, 175 W.Va. 709, 338 S.E.2d 188 (1985).' Syllabus Point 2, *State v. Stewart*, 180 W.Va. 173, 375 S.E.2d 805 (1988)." Syllabus Point 1, *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994).

Syl. pt. 2 - "[W]here a trial court admits a confession without making specific findings as to the totality of the circumstances, the admission of the confession will nevertheless be upheld on appeal, but only if a reasonable review of the evidence clearly supports voluntariness." Syllabus Point 3, in part, *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994).

Syl. pt. 3 - Police involvement is a prerequisite for finding a confession involuntary. Under the *West Virginia Constitution*, the voluntariness of a confession for due process purposes turns solely on the constitutional acceptability of the specific police conduct at issue. While the personal characteristics of a defendant may be considered in determining the admissibility of a confession under Rules 401 through 403 of the *West Virginia Rules of Evidence*, personal characteristics such as the mental condition or the subjective state of a defendant by themselves and apart from their relation to official or police involvement are not significant in deciding the voluntariness question.

## CONFESSIONS

**Voluntariness** (continued)

***State v. Honaker***, (continued)

Syl. pt. 4 - Police involvement must be evident before a statement is considered involuntary under the West Virginia Due Process Clause. To the extent that *State v. Sanders*, 161 W.Va. 39, 242 S.E.2d 554 (1978), and *State v. Muegge*, 178 W.Va. 439, 360 S.E.2d 216 (1987), hold otherwise, they are expressly overruled.

The Court noted that the record was inadequate, lacking a transcript of the suppression hearing, with only the resultant order admitting appellant's statements. In the absence of a record the Court must presume the lower court acted correctly. II Franklin D. Cleckley, *Handbook on West Virginia Criminal Procedure*, 497-98 (1993). (*Note*: see footnotes 4 and 5 wherein the Court warned that future appeals will be held to a high standard of designating the record; facts and issues unsupported by the record will be ignored.)

Here, because the issue was one of law, not fact (thus making the inadequate record irrelevant), the Court found no state action (police involvement) concerning appellant's statements in the presence of hospital personnel. Inherent problems of reliability of statements made while mentally unstable were not addressed (although the door was left open to consider reliability in future cases; Rules 401 and 403 of the *Rules of Evidence* are to control where reliability is questioned in statements between private persons).

As to statements made to police, it was clear that appellant was not given her Miranda rights and was questioned by two officers following her refusal to take a polygraph examination. Although appellant was not arrested she stated she understood she could not leave the police office. The Court found no evidence of coercion by police, nor of appellant's incapacity; similarly, appellant was not in custody, so Miranda warnings were not required. The test for requiring Miranda warnings is not the subjective impression of the defendant. Admissible. No error.

**CONFESSIONS**

**Voluntariness** (continued)

***State v. Jones***, 456 S.E.2d 459 (1995) (Cleckley, J.)

See SELF-INCRIMINATION Statements by defendant, (p. 594) for discussion of topic.

***State v. Moore***, 457 S.E.2d 801 (1995) (Neely, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Voluntariness, Intelligence a factor, (p. 608) for discussion of topic.

**Delay in taking before magistrate**

***State ex rel. Bess v. Legursky***, 465 S.E.2d 892 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 371) for discussion of topic.

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See JUVENILE Self-incrimination, Waiver of right to counsel, (p. 447) for discussion of topic.

**Statements to private persons**

***State v. Honaker***, 454 S.E.2d 96 (1994) (Cleckley, J.)

See CONFESSIONS Voluntariness, (p. 153) for discussion of topic.

## CONFRONTATION CLAUSE

### Spousal testimony to grand jury

***State v. Jarrell***, 442 S.E.2d 223 (1994) (Brotherton, J.)

See RIGHT TO CONFRONT Spousal testimony to grand jury, (p. 569) for discussion of topic.

## CONSENT

### To warrantless search

***State v. Buzzard***, 461 S.E.2d 50 (1995) Workman, J.)

See SEARCH AND SEIZURE Warrantless search, Consent to, (p. 584) for discussion of topic.

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

See SEARCH AND SEIZURE Warrantless search, Consent to, (p. 587) for discussion of topic.

## CONSPIRACY

### Test for multiple offenses

***State v. Hardesty***, 461 S.E.2d 478 (1995) (Fox, J.)

See DOUBLE JEOPARDY Totality of circumstances test, (p. 184) for discussion of topic.

## CONSTITUTIONAL INTERPRETATION

### Amendment controls over prior

***State ex rel. Collins v. Bedell***, 460 S.E.2d 636 (1995) (McHugh, C.J.)
(consolidated) ***State ex rel. Peeples v. Knight***, 460 S.E.2d 636 (1995) (McHugh, C.J.)

See MAGISTRATE COURT Appeal from, (p. 454) for discussion of topic.

### Generally

***State ex rel. Collins v. Bedell***, 460 S.E.2d 636 (1995) (McHugh, C.J.)
(consolidated) ***State ex rel. Peeples v. Knight***, 460 S.E.2d 636 (1995) (McHugh, C.J.)

See MAGISTRATE COURT Appeal from, (p. 454) for discussion of topic.

### Specific controls over general

***State ex rel. Collins v. Bedell***, 460 S.E.2d 636 (1995) (McHugh, C.J.)
(consolidated) ***State ex rel. Peeples v. Knight***, 460 S.E.2d 636 (1995) (McHugh, C.J.)

See MAGISTRATE COURT Appeal from, (p. 454) for discussion of topic.

**CONTEMPT**

**Civil**

**Threatening the court**

***State ex rel. Skaggs v. Plumley***, No. 22074 (2/2/94) (Per Curiam)

See HABEAS CORPUS Contempt of court, (p. 324) for discussion of topic.

**Court reporter**

**Failure to produce**

***State ex rel. Nazelrod v. Edwards***, No. 22047 (2/14/94) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 691, 692) for discussion of topic.

**Failure to produce transcript**

***State ex rel. Hemingway v. Edwards***, No. 22437 (10/6/94) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 691, 692) for discussion of topic.

***State ex rel. Shane v. Edwards***, No. 22483 (10/6/94) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 693) for discussion of topic.

## CONTINUANCE

### Discretion in granting

***Hamilton v. Ravasio***, 451 S.E.2d 749 (1994) (Per Curiam)

See EVIDENCE  Admissibility, Hearsay, (p. 232) for discussion of topic.

**CONTRABAND FORFEITURE ACT**

**Application of**

***Lawrence Frail v. $24,900, Palmero and Rivera***, 453 S.E.2d 307 (1994) (Miller, J.)

See FORFEITURE Probable cause required, (p. 308) for discussion of topic.

## CONTROLLED SUBSTANCES

### Double jeopardy

#### Possession with intent to deliver

***State v. Hardesty***, 461 S.E.2d 478 (1995) (Fox, J.)

See DOUBLE JEOPARDY Totality of circumstances test, (p. 184) for discussion of topic.

### Forfeiture of proceeds from

***Lawrence Frail v. $24,900, Palmero and Rivera***, 453 S.E.2d 307 (1994) (Miller, J.)

See FORFEITURE Probable cause required, (p. 308) for discussion of topic.

### Possession with intent to deliver

#### Double jeopardy

***State v. Hardesty***, 461 S.E.2d 478 (1995) (Fox, J.)

See DOUBLE JEOPARDY Totality of circumstances test, (p. 184) for discussion of topic.

**COURT REPORTER**

**Transcript**

**Failure to produce**

***State ex rel. Cajero v. Edwards***, No. 22138 (4/18/94) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 689) for discussion of topic.

***State ex rel. Elswick v. Lawson***, No. 22790 (4/11/95) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 689) for discussion of topic.

***State ex rel. Garrett v. Lawson***, No. 22264 (6/16/94) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 691) for discussion of topic.

***State ex rel. Hemingway v. Edwards***, No. 22437 (10/6/94) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 691, 692) for discussion of topic.

***State ex rel. Lopez v. Edwards***, No. 22262 (6/15/94) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 692) for discussion of topic.

***State ex rel. Nazelrod v. Edwards***, No. 22047 (2/14/94) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 691, 692) for discussion of topic.

**COURT REPORTER**

**Transcript** (continued)

**Failure to produce** (continued)

***State ex rel. Shane v. Edwards***, No. 22483 (10/6/94) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 693) for discussion of topic.

***State ex rel. Taylor v. Edwards***, No. 22841 (6/7/95) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 693) for discussion of topic.

***State ex rel. Valentine v. Lawson***, No. 22780 (4/11/95) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 694) for discussion of topic.

## CROSS-EXAMINATION

### Purposes of

***State v. Mason***, 460 S.E.2d 36 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Extrajudicial statements, (p. 226) for discussion of topic.

### Reenactment of crime

#### Admissibility

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Reenactment of crime, (p. 247) for discussion of topic.

### Scope of

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

See PROSECUTING ATTORNEYS Conduct at trial, Cross-examination, (p. 550) for discussion of topic.

#### Reputation of accused

***State v. Roy***, 460 S.E.2d 277 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Reputation of accused, (p. 249) for discussion of topic.

### Witness' fees

***State v. Osakalumi***, 461 S.E.2d 504 (1995) (McHugh, C.J.)

See WITNESSES Experts fees, Cross-examination on, (p. 711) for discussion of topic.

## CRUEL AND UNUSUAL PUNISHMENT

### Commutation of sentence

***Crain v. Bordenkircher***, 454 S.E.2d 108 (1994) (Workman, J.)

See PRISON/JAIL CONDITIONS Generally, (p. 521) for discussion of topic.

### Denial of medical care

***Wilson v. Hun***, 457 S.E.2d 662 (1995) (Per Curiam)

See PRISON/JAIL CONDITIONS Medical care, (p. 522) for discussion of topic.

**DEADLY WEAPON**

**License to carry**

**Restrictions on**

***In re Application of Luzader***, No. 22850 (12/8/95) (Per Curiam)

Appellant filed an application to carry a concealed deadly weapon pursuant to *W.Va. Code*, 61-7-4. Upon a hearing the circuit court issued a license but imposed various restrictions, including limiting the license to Monongalia County. The circuit court also noted that appellant had "no need" to carry the weapon.

The issuance here predated *In re Application of Dailey*, 195 W.Va. 330, 465 S.E.2d 601 (1995) wherein the Court ruled that the procedure outlined in both the 1989 and 1995 versions of the statute was an unconstitutional delegation of police power to the judiciary. The Court declared this appeal moot.

## DETENTION

### Juveniles

#### Finding required

***Larry L. v. State***, 444 S.E.2d 43 (1994) (Per Curiam)

See JUVENILES Detention, Least restrictive alternative, (p. 437) for discussion of topic.

## DIRECTED VERDICT

### Standard for review on appeal

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

See HOMICIDE  Corpus delicti, Proof of, (p. 333) for discussion of topic.

## DISCIPLINE

### Attorneys

***Committee on Legal Ethics v. Burdette***, 445 S.E.2d 733 (1994) (Per Curiam)

See ATTORNEYS Discipline, Overcharging in workers' compensation, (p. 89) for discussion of topic.

***Committee on Legal Ethics v. Cunningham***, No. 21717 (2/17/94) (Per Curiam)

See ATTORNEYS Discipline, Failure to follow reinstatement plan, (p. 72) for discussion of topic.

***Committee on Legal Ethics v. Farber***, 447 S.E.2d 602 (1994) (Per Curiam)

See ATTORNEYS Discipline, Failure to follow reinstatement plan, (p. 73) for discussion of topic.

***Committee on Legal Ethics v. Fletcher***, No. 22132 (5/20/94) (Per Curiam)

See ATTORNEYS Discipline, Failure to rule on estate, (p. 80) for discussion of topic.

***Committee on Legal Ethics v. Goodman***, 441 S.E.2d 382 (1994) (Per Curiam)

See ATTORNEYS Discipline, Misconduct in another jurisdiction, (p. 82) for discussion of topic.

***Committee on Legal Ethics v. Martin***, No. 20859 (2/18/94) (Per Curiam)

See ATTORNEYS Discipline, Failure to follow reinstatement plan, (p. 74) for discussion of topic.

**Attorneys** (continued)

***Committee on Legal Ethics v. ReBrook***, No. 21975 (2/18/94) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 67) for discussion of topic.

***Committee on Legal Ethics v. Shingleton***, No. 22171 (5/20/94) (Per Curiam)

See ATTORNEYS Discipline, Real estate release not filed, (p. 92) for discussion of topic.

***Lawyer Disciplinary Board v. Taylor***, 455 S.E.2d 569 (1995) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 67) for discussion of topic.

**Emergency suspension**

***Office of Disciplinary Counsel v. Battistelli***, 457 S.E.2d 652 (1995) (Workman, J.)

See ATTORNEYS Discipline, Emergency suspension, (p. 69) for discussion of topic.

**Suspension from bankruptcy court**

***Lawyer Disciplinary Board v. Kohout***, No. 22629 (4/14/95) (Per Curiam)

See ATTORNEYS Discipline, Misrepresentation on bar application, (p. 84) for discussion of topic.

## DISCIPLINE

### *Ex parte* communications

***In the Matter of Starcher***, 457 S.E.2d 147 (1995) (Per Curiam)

See JUDGES Discipline, *Ex parte* communications, (p. 400) for discussion of topic.

### Judges

***In the Matter of Hey***, 457 S.E.2d 509 (1995) (Per Curiam)

See JUDGES Discipline, Sexual harassment, (p. 405) for discussion of topic.

***In the Matter of Starcher***, 457 S.E.2d 147 (1995) (Per Curiam)

See JUDGES Discipline, *Ex parte* communications, (p. 400) for discussion of topic.

### Sexual harassment

***In the Matter of Hey***, 457 S.E.2d 509 (1995) (Per Curiam)

See JUDGES Discipline, Sexual harassment, (p. 405) for discussion of topic.

## DISCOVERY

### Failure to comply

#### When prejudicial

***State v. Linkous***, 460 S.E.2d 288 (1995) (Per Curiam)

Appellant was convicted of negligent homicide resulting from a motor vehicle accident. During discovery, the defense requested disclosure of prior convictions of prosecution witnesses. The state said it could not comply because of the lack of witnesses' birth dates and social security numbers. No action was taken on the request.

Syl. pt. 2 - " 'Our traditional appellate standard for determining whether the failure to comply with court[-]ordered pretrial discovery is prejudicial is contained in Syllabus Point 2 of *State v. Grimm*, 165 W.Va. 547, 270 S.E.2d 173 (1980), and is applicable to discovery under Rule 16 of the *Rules of Criminal Procedure*. It is summarized: The non-disclosure is prejudicial where the defense is surprised on a material issue and where the failure to make the disclosure hampers the preparation and presentation of the defendant's case.' Syl. Pt. 1, *State v. Johnson*, 179 W.Va. 619, 371 S.E.2d 340 (1988)." Syllabus Point 2, *State v. Gary F.*, 189 W.Va. 523, 432 S.E.2d 793 (1993).

The Court noted Rule 16(a)(1)(E) requires disclosure of prior convictions "within the knowledge of the state." Here, the state was under no duty since it had no knowledge. A witness list was supplied well in advance. Prior convictions were not at issue, no surprise or prejudice was shown. No error.

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

Appellant was convicted of second-degree sexual assault. He claimed the circuit court erred in refusing to allow him to interview the victim, who was fifteen years old at the time of trial. As part of pretrial discovery the prosecution provided the defense with the victim's statements.

Syl. pt. 4 - "Subject to certain exceptions, pretrial discovery in a criminal case is within the sound discretion of the trial court." Syllabus Point 8, *State v. Audia*, 171 W.Va. 568, 301 S.E.2d 199, *cert. denied*, 464 U.S. 934, 104 S.Ct. 338, 78 L.Ed.2d 307 (1983).

**DISCOVERY**

**Failure to comply** (continued)

**When prejudicial** (continued)

***State v. Miller***, (continued)

The Court noted that *W.Va. Code*, 61-8b-14 allows for interview of child victims of eleven years old or less; that a child's court-appointed lawyer must be present, *Burdette v. Lobban*, 174 W.Va. 120, 323 S.E.2d 601 (1984); and that certain factors must be considered prior to granting an interview. *State v. Delaney*, 187 W.Va. 212, 417 S.E.2d 903 (1992).

Further, the Court noted *W.Va.R.Crim.P*. 15(a) governs depositions of one's own witness. *State v. Judy*, 179 W.Va. 739, 372 S.E.2d 802 (1988). Nothing cited requires a child victim to be subjected to a defense interview. No error.

**Failure to disclose**

**Consequences of**

***State ex rel. Rusen v. Hill***, 454 S.E.2d 427 (1994) (Cleckley, J.)

See DISCOVERY Sanctions, Dismissal of indictment, (p. 179) for discussion of topic.

**Late-discovered evidence**

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

Appellant was convicted of first-degree murder. At trial paint chips found on the victim's clothing were apparently misplaced until the end of the first day of trial. The chips were first analyzed by the F.B.I., then, upon later discovery, by the State Police. Appellant claimed violation of Rule 16 of the *Rules of Criminal Procedure* and Rule 403 of the *Rules of Evidence* in that the evidence was unreliable and prejudicial.

**DISCOVERY**

**Failure to disclose** (continued)

**Late-discovered evidence** (continued)

***State v. Beard***, (continued)

Syl. pt. 4 - "Where the State is unaware until the time of trial of material evidence which it would be required to disclose under a Rule 16 discovery request, the State may use the evidence at trial provided that: (1) the State discloses the information to the defense as soon as reasonably possible; and (2) the use of the evidence at trial would not unduly prejudice the defendant's preparation for trial." Syllabus, *State v. Hager*, 176 W.Va. 313, 342 S.E.2d 281 (1986), *overruled on other grounds* by *State v. Woodson*, 181 W.Va. 325, 382 S.E.2d 519 (1989).

The prosecution claimed they notified appellant either the day after or the same day the evidence was discovered; appellant did not claim undue delay. As to prejudice, the Court found no abuse of discretion in the trial court's finding of no prejudice. Finally, the chain of custody was properly established.

The prosecution's theory was that the paint chips came from a co-defendant's vehicle; however, neither the prosecution nor defense had access to the vehicle. Because the evidence was clearly probative, no error in admitting it; appellant's own theory of the case would have made the van irrelevant anyway. No error.

**Witnesses**

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

Appellant was convicted of second-degree sexual assault. On appeal he claimed the prosecution failed to disclose a rebuttal witness. Several witnesses described how appellant moved from the county of the crime prior to the date of the assault. He claimed he could have shown he was living in another county with proper notice.

**DISCOVERY**

**Failure to disclose** (continued)

**Witnesses** (continued)

***State v. Miller***, (continued)

Syl. pt. 5 - "The traditional appellate standard for determining prejudice for discovery violation under Rule 16 of the *West Virginia Rules of Criminal Procedure* involves a two-pronged analysis: (1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case." Syllabus Point 2, *State ex rel. Rusen v. Hill*, 193 W.Va. 133, 454 S.E.2d 427 (1994).

Here, the prosecution clearly stated it did not know until after defense witnesses' testimony that a rebuttal witness would be needed. Noting that defense counsel raised the issue of residence and did not request a delay when the prosecution introduced the rebuttal, the Court found no error.

**Judge's discretion**

***State ex rel. Rusen v. Hill***, 454 S.E.2d 427 (1994) (Cleckley, J.)

See DISCOVERY Sanctions, Dismissal of indictment, (p. 179) for discussion of topic.

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

See DISCOVERY Failure to comply, When prejudicial, (p. 175) for discussion of topic.

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

See DISCOVERY Failure to disclose, Witnesses, (p. 177) for discussion of topic.

## DISCOVERY

### Physical or mental examinations

***State v. Roy***, 460 S.E.2d 277 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Psychological/psychiatric, (p. 245) for discussion of topic.

### Sanctions

#### Dismissal of indictment

***State ex rel. Rusen v. Hill***, 454 S.E.2d 427 (1994) (Cleckley, J.)

Relator asked for writ of prohibition to prevent dismissal of an indictment based on partial noncompliance with a pretrial discovery order. Defendant was charged with embezzlement from Burger King in May, 1993. Pursuant to Rule 16(d)(2) of the *Rules of Criminal Procedure*, defendant asked for discovery.

Trial was originally set for 22 June 1993 but on 10 June 1993 relator moved to dismiss, without prejudice, the indictment as insufficient to inform defendant of the charges. A second indictment was returned in September, 1993 and trial set for 8 November 1993. On 7 October 1993, defendant renewed her motion for discovery; having no response defendant moved to continue on 19 October 1993. Relator responded 29 October 1993.

Motion to continue was granted 1 November 1993, with trial to begin in January, 1994. By letter dated 23 November 1993, defense counsel asked for additional discovery, which request was orally agreed to by the prosecution. An order was entered 15 February 1994 setting 28 February 1994 as the deadline for discovery. Trial was set for 21 March 1994 but as of 4 February 1994 discovery was not made. On 11 March 1994, pursuant to defendant's motion, a hearing was held on why discovery was not complete. The state represented the documents in question were in the hands of Burger King and due to a misunderstanding other documents were provided.

**DISCOVERY**

**Sanctions** (continued)

**Dismissal of indictment** (continued)

***State ex rel. Rusen v. Hill***, (continued)

The circuit court ruled the documents were to be given to defense counsel within ten days, otherwise dismissal would result. The case was continued to the May, 1994 term. On 21 March 1994, the state served what it contended was full discovery. On 27 April 1994, defense counsel renewed his motion to dismiss, alleging omissions and illegible reports. At a 4 May 1994 hearing the prosecution argued that substantial information had been given. The circuit court dismissed. In an extensive motion to reconsider, the prosecution argued lack of notice of illegible documents, clerical errors by Burger King and substantial compliance. The court denied the motion, despite defense admission that no prejudice had resulted.

Syl. pt. 1 - "The State may seek a writ of prohibition in this Court in a criminal case where the trial court has exceeded or acted outside of its jurisdiction. Where the State claims that the trial court abused its legitimate powers, the State must demonstrate that the court's action was so flagrant that it was deprived of its right to prosecute the case or deprived of a valid conviction. In any event, the prohibition proceeding must offend neither the Double Jeopardy Clause nor the defendant's right to a speedy trial. Furthermore, the application for a writ of prohibition must be promptly presented." Syllabus Point 5, *State v. Lewis*, 188 W.Va. 85, 422 S.E.2d 807 (1992).

Syl. pt. 2 - The traditional appellate standard for determining prejudice for discovery violations under Rule 16 of the *West Virginia Rules of Criminal Procedure* involves a two-pronged analysis: (1) did the non-disclosure surprise the defendant on a material fact, and (2) did it hamper the preparation and presentation of the defendant's case.

Syl. pt. 3 - A circuit court may choose dismissal for egregious and repeated violations where lesser sanctions such as a continuance would be disruptive to the administration of justice or where the lesser sanctions cannot provide the same degree of assurance that the prejudice to the defendant will be dissipated.

**DISCOVERY**

**Sanctions** (continued)

**Dismissal of indictment** (continued)

***State ex rel. Rusen v. Hill***, (continued)

Syl. pt. 4 - In exercising discretion pursuant to Rule 16(d)(2) of the *West Virginia Rules of Criminal Procedure*, a circuit court is not required to find actual prejudice to be justified in sanctioning a party for pretrial discovery violations. Prejudice may be presumed from repeated discovery violations necessitating numerous continuances and delays.

Despite there being no reported cases in West Virginia on dismissal as a sanction for violation of discovery, the Court upheld the circuit court, finding no abuse of discretion. (See text of opinion for extensive balancing tests).

Despite finding that a continuance is normally the best approach for discovery inadequacies, the Court cited with approval authorities noting that liberal discovery encourages plea negotiations. Here, the discovery problems continued over an eight month period and necessitated two continuances and the state did not mention the possibility of a subpoena duce tecum until too late. The Court noted the murky pretrial context makes difficult prediction of prejudice; because the stakes are higher in a criminal than a civil cases, harsh measures can be justified. Actual prejudice need not be shown. No error.

## DISCRIMINATION

### Racial

#### Jury bias

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

See EQUAL PROTECTION  Right to jury free of racial discrimination, (p. 201) for discussion of topic.

#### Jury selection

***State v. Kirkland***, 447 S.E.2d 278 (1994) (Workman, J.)

See EQUAL PROTECTION  Right to jury free of racial discrimination, (p. 202) for discussion of topic.

## DOUBLE JEOPARDY

### Aiding and abetting

***State v. Mayo***, 443 S.E.2d 236 (1994) (Miller, J.)

See AIDING AND ABETTING Witnessing crime, (p. 22) for discussion of topic.

### Concurrent sentencing

#### Insufficient to cure

***State v. Hardesty***, 461 S.E.2d 478 (1995) (Fox, J.)

See DOUBLE JEOPARDY Totality of circumstances test, (p. 184) for discussion of topic.

### Evidence omitted

***State v. Mayo***, 443 S.E.2d 236 (1994) (Miller, J.)

See AIDING AND ABETTING Witnessing crime, (p. 22) for discussion of topic.

### Generally

***State v. Kirkland***, 447 S.E.2d 278 (1994) (Workman, J.)

See SUFFICIENCY OF EVIDENCE Generally, (p. 663) for discussion of topic.

## DOUBLE JEOPARDY

### Multiple offenses

#### Conspiracy

***State v. Hardesty***, 461 S.E.2d 478 (1995) (Fox, J.)

See DOUBLE JEOPARDY Totality of circumstances test, (p. 184) for discussion of topic.

#### Possession with intent to deliver

***State v. Hardesty***, 461 S.E.2d 478 (1995) (Fox, J.)

See DOUBLE JEOPARDY Totality of circumstances test, (p. 184) for discussion of topic.

### Sufficiency of evidence

***State v. Kirkland***, 447 S.E.2d 278 (1994) (Workman, J.)

See SUFFICIENCY OF EVIDENCE Generally, (p. 663) for discussion of topic.

### Totality of circumstances test

***State v. Hardesty***, 461 S.E.2d 478 (1995) (Fox, J.)

Appellant was convicted of eight offenses relating to possession and delivery of controlled substances. She claimed she received multiple punishments for the same offense in violation of double jeopardy principles.

An informant with a drug task force offered to buy "four hits of acid" from appellant at a bar. She sold him LSD. The informant returned the next day and asked to buy more LSD; appellant called her daughter's boyfriend, who appeared with the drug which the informant purchased.

## DOUBLE JEOPARDY

**Totality of circumstances test** (continued)

***State v. Hardesty***, (continued)

Appellant's daughter's boyfriend offered to sell the informant more LSD later the same day. The informant and the boyfriend returned to appellant's bar and secured the drug from appellant. Appellant was charged with possession with intent to deliver within 1000 feet of a public school, in violation of *W.Va. Code*, 60A-4-401(a)(ii); delivery of an imitation controlled substance in violation of *W.Va. Code*, 60A-4-401(b); and with conspiracy to deliver a controlled substance in violation of *W.Va. Code*, 60-10-31. Appellant was convicted of three counts of possession with intent to deliver, three counts of delivery and two counts of conspiracy to deliver and sentenced to eight concurrent one to five year sentences.

Syl. pt. 1 - Concurrent sentencing does not cure violations of constitutional double jeopardy provisions prohibiting multiple punishments for the same offense.

Syl. pt. 2 - "The following factors are normally considered under a totality of circumstances test to determine whether one or two conspiracies are involved: (1) time; (2) persons acting as co-conspirators; (3) the statutory offenses charged in the indictments; (4) the overt acts charged by the government or any other description of the offenses charged which indicate the nature and the scope of the activity which the government sought to punish in each case; and (5) places where the events alleged as part of the conspiracy took place. These factors are guidelines only. The essence of the determination is whether there is one agreement to commit two crimes, or more than one agreement, each with a separate object." Syllabus point 8, *State v. Johnson*, 179 W.Va. 619, 371 S.E.2d 340 (1988).

Appellant claimed the evidence supported only four crimes, three LSD sales and one continuing conspiracy. The circuit court ruled the three possession with intent to deliver charges and the three delivery charges were duplicative and sought to cure the double jeopardy error by running the sentences concurrently.

## DOUBLE JEOPARDY

**Totality of circumstances test** (continued)

***State v. Hardesty***, (continued)

The Court found concurrent sentencing insufficient because multiple convictions affect parole. See *State ex rel. Blake v. Chafin*, 183 W.Va. 269, 395 S.E.2d 513 (1990). The Court found the circuit court should have struck the duplicative possession with intent to deliver charges; the conspiracy charges stand because of the separate sales on separate days, involving different people (first appellant and then her daughter's boyfriend). Reversed in part.

## DRIVING UNDER THE INFLUENCE

### Blood alcohol tests

***State ex rel. Allen v. Bedell***, 454 S.E.2d 77 (1994) (Workman, J.)

Petitioner sought a writ of prohibition on further prosecution in his conviction for DUI causing death. Petitioner was taken to a hospital following the accident and was given a blood test by hospital personnel. The reason given for the test was for diagnostic purposes and because petitioner smelled of alcohol. This first test, taken at 1:07 a.m. indicated a blood alcohol level of 0.14%. A second test was performed at the instance of an arresting officer at 2:40 a.m.; it registered 0.06%. The trial court allowed testimony as to the first sample but not paperwork.

Syl. pt. 1 - West Virginia Code § 17C-5-4 (1991) does not govern the admissibility of the results of a diagnostic blood alcohol test conducted prior to the arrest of a defendant and at the direction of a defendant's treating physician or other medical personnel.

Syl. pt. 2 - Medical records containing the results of blood alcohol tests ordered by medical personnel for diagnostic purposes are subject tot subpoena and shall not be deemed inadmissible by virtue of the provisions of West Virginia Code § 57-5-4d (Supp. 1994).

Syl. pt. 3 - " 'Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' *State v. Louk*, 171 W.Va. 639, 643, 301 S.E.2d 596, 599 (1983)." Syl. Pt. 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983).

The Court found that the procedures in *W.Va. Code*, 17C-5-4 need not be followed when a blood test is done for diagnostic purposes; the statute is intended to set a procedure for law enforcement personnel, not for medical personnel. (The second test was done in compliance with the statute.)

Further, the Court found no privilege with respect to medical records. *W.Va. Code*, 57-5-4d merely establishes a procedure for medical personnel to respond to subpoenas. Even where such privileges have been recognized, only confidential disclosures by the patient are protected. No error. Writ denied.

**DRIVING UNDER THE INFLUENCE**

**Blood alcohol tests** (continued)

**No right to**

***Boley v. Cline***, 456 S.E.2d 38 (1995) (Per Curiam)

(**NOTE**: Although this case involves administrative revocation of drivers' licenses, it is included because issues presented are applicable to criminal DUI proceedings.)

Appellant was observed driving his vehicle weaving on the road. The arresting officer detected the odor of alcohol. Appellant failed the horizontal gaze nystagmus test and was arrested for DUI. He registered .182 on the breathalyzer test and his license was revoked. The breathalyzer test and some field sobriety tests were excluded but the horizontal gaze test was admitted.

On appeal, the circuit court affirmed. In this Court, appellant claimed the Commissioner's revocation to be "clearly wrong in view of the reliable, probative and substantial evidence on the whole record..."

Syl. pt. 1 - "Where there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his driver's license for driving under the influence of alcohol." Syl. pt. 2, *Albrecht v. State*, 173 W.Va. 268, 314 S.E.2d 859 (1984).

Syl. pt. 2 - "There are no provisions in either *W.Va. Code*, 17C-5-1 (1981), *et seq.*, or *W.Va. Code*, 17C-5A-1 (1981), *et seq.*, that require the administration of a chemical sobriety test in order to prove that a motorist was driving under the influence of alcohol or drugs for purposes of making an administrative revocation of his driver's license." Syl. pt. 1, *Albrecht v. State*, 173 W.Va. 268, 314 S.E.2d 859 (1984).

The Court found sufficient evidence to support the revocation. No error.

## DRIVING UNDER THE INFLUENCE

### Chemical test not required

***Dean v. W.Va. Dept. of Motor Vehicles***, 464 S.E.2d 589 (1995) (Per Curiam)

(**NOTE**: This case involves a license revocation proceeding but is included because of issues which arise in criminal proceedings.)

Appellant failed a field sobriety test (horizontal gaze nystagmus) following an accident involving his vehicle. He was arrested for driving under the influence of alcohol. No other field tests were given, nor were blood, breath or urine tests given. Appellant's license was revoked by the Department of Motor Vehicles following a hearing.

The circuit court found the officer's testimony as to appellant's actions, condition, odor of alcohol and the HGN test to be sufficient proof of DUI. Appellant claimed the evidence was insufficient in that the smell of alcohol is not conclusive, accidents like the one at issue occur without alcohol, and appellant sustained a head injury accounting for the HGN test results.

Syl. pt. 1 - "Where there is evidence reflecting that a driver was operating a motor vehicle upon a public street or highway, exhibited symptoms of intoxication, and had consumed alcoholic beverages, this is sufficient proof under a preponderance of the evidence standard to warrant the administrative revocation of his drivers's license for driving under the influence of alcohol." Syl. pt. 2, *Albrecht v. State*, 173 W.Va. 268, 314 S.E.2d 859 (1984).

Syl. pt. 2 - "There are no provisions in either *W.Va. Code*, 17C-5-1 (1981), *et seq.*, or *W.Va. Code*, 17C-5A-1 (1981), *et seq.*, that require the administration of a chemical sobriety test in order to prove that a motorist was driving under the influence of alcohol or drugs for purposes of making an administrative revocation of his drivers license." Syl. pt. 1, *Albrecht v. State*, 173 W.Va. 268, 314 S.E.2d 859 (1984).

Syl. pt. 3 - "This Court will not consider questions, nonjurisdictional in their nature, which have not been acted upon by the trial court." Syl. pt. 4, *Wheeling Downs Racing Association v. West Virginia Sportservice, Inc.*, 157 W.Va. 93, 199 S.E.2d 308 (1973).

**Chemical test not required** (continued)

***Dean v. W.Va. Dept. of Motor Vehicles***, (continued)

The Court found the Commissioner made a reasonable determination. The record contained sufficient proof to justify the finding that appellant was DUI. The Court rejected appellant's assertion that criminal prosecution and administrative revocation for the same acts constitutes double jeopardy, in that it was not raised below. Affirmed.

**Field sobriety tests**

***Boley v. Cline***, 456 S.E.2d 38 (1995) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Blood alcohol tests, No right to, (p. 188) for discussion of topic.

**Home detention**

***State v. Long***, 450 S.E.2d 806 (1994) (Miller, J.)

See SENTENCING Home detention, (p. 626) for discussion of topic.

**Horizontal gaze nystagmus test**

***Boley v. Cline***, 456 S.E.2d 38 (1995) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Blood alcohol tests, No right to, (p. 188) for discussion of topic.

## DRIVING UNDER THE INFLUENCE

### Second offense

#### Home detention

***State v. Long***, 450 S.E.2d 806 (1994) (Miller, J.)

See SENTENCING  Home detention, (p. 626) for discussion of topic.

#### Sentencing

***State v. Long***, 450 S.E.2d 806 (1994) (Miller, J.)

See SENTENCING  Home detention, (p. 626) for discussion of topic.

### Sentencing

#### Driving to work

***State v. Long***, 450 S.E.2d 806 (1994) (Miller, J.)

See SENTENCING  Home detention, (p. 626) for discussion of topic.

#### Home detention

***State v. Long***, 450 S.E.2d 806 (1994) (Miller, J.)

See SENTENCING  Home detention, (p. 626) for discussion of topic.

### Sobriety check points

***State v. Davis***, 464 S.E.2d 598 (1995) (Per Curiam)

Appellant was convicted of first offense DUI. Appellant had attended a gathering at a state park, during which she consumed five beers. Following dinner she drove to Marlinton, where she was staying. Upon entering the town, she encountered a police roadblock.

**Sobriety check points** (continued)

***State v. Davis***, (continued)

The officers at the roadblock testified that appellant's vehicle was moving excessively slowly approaching the roadblock and that she stopped thirty feet away. Upon approaching appellant's vehicle, one officer noticed the smell of alcohol, slurred speech and observed that appellant's eyes were red. Appellant was unable to recite the alphabet and failed a horizontal gaze nystagmus test, and subsequent other tests administered at the jail.

Appellant claimed the roadblock was an unconstitutional search and seizure. The state claimed the roadblock was solely to check for driver's licenses, vehicle registration and liability insurance. Every vehicle approaching was stopped. The primary officer admitted checking for drunk drivers but denied the roadblock was a sobriety check point.

Syl. pt. 1 - "While police officers may enforce the licensing and registration laws for drivers and motor vehicles respectively by routine checks of licenses and registrations, such checks must be done according to some non-discriminatory, random, pre-conceived plan such as established check points or examination of vehicles with particular number of letter configurations on a given day, accordingly detention of vehicles without probable cause to believe that a registration is irregular absent a random, non-discriminatory, preconceived plan is contrary to the Fourth Amendment to the Fourth Amendment to the *Constitution of the United States* and *W.Va. Constitution* art. 3, sec. 6." Syl. pt. 5, *State v. Frisby*, 161 W.Va. 734, 245 S.E.2d 622 (1978).

Syl. pt. 2 - " 'Probable cause to make a misdemeanor arrest without a warrant exists when the facts and circumstances within the knowledge of the arresting officer are sufficient to warrant a prudent man in believing that a misdemeanor is being committed in his presence.' " Syl., *Simon v. West Virginia Department of Motor Vehicles*, 181 W.Va. 267, 382 S.E.2d 320 (1989)." Syl. pt. 1, *Cunningham v. Bechtold*, 186 W.Va. 474, 413 S.E.2d 129 (1991).

## DRIVING UNDER THE INFLUENCE

**Sobriety check points** (continued)

***State v. Davis***, (continued)

A sobriety check point was at issue in *Carte v. Cline*, 194 W.Va. 233, 460 S.E.2d 48 (1995). The Court upheld the general constitutionality of sobriety check points which are conducted according to predetermined rules which minimize intrusion (remanded to determine if procedures were followed). See also, *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990).

Although the roadblock was not conducted according to sobriety check point guidelines, the circuit court was not clearly wrong in determining the roadblock was merely a license and registration check. Further, no showing of discrimination was made; appellant was not singled out. No error.

**Notice of intent to challenge**

***Carte v. Cline***, 460 S.E.2d 48 (1995) (Fox, J.)

Appellant's drivers' license was revoked for six months for driving under the influence of alcohol. He claimed his arrest and subsequent revocation was improper because police failed to comply with the Standard Operating Procedures of the West Virginia Department of Public Safety for Sobriety Check points. Further, he claimed his right to be secure from unreasonable search and seizure was violated. Article III, Section 6, *West Virginia Constitution*.

Syl. pt. 1 - Sobriety check point roadblocks are constitutional when conducted within predetermined operational guidelines which minimize the intrusion on the individual and mitigate the discretion vested in police officers at the scene.

Syl. pt. 2 - A person who wishes to challenge official compliance with and adherence to sobriety check point operational guidelines shall give written notice of that intent to the commissioner of motor vehicles prior to the administrative revocation hearing which is conducted pursuant to *W.Va. Code* § 17C-5A-2.

**DRIVING UNDER THE INFLUENCE**

**Sobriety check points** (continued)

**Notice of intent to challenge** (continued)

***Carte v. Cline***, (continued)

The Court noted nondiscriminatory check points are generally permissible. *State v. Frisby*, 161 W.Va. 734, 245 S.E.2d 622, at 625, (1978). See also, *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976); cf. *Delaware v. Prouse*, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979); *Michigan Department of State Police v. Stiz*, 496 U.S. 444, 110 S.Ct. 2481, 100 L.Ed.2d 412 (1990) (finding *Michigan's* check point program constitutional).

The Court found the arresting officer was unable to testify as to whether all procedures were followed. This sort of foundation requirement was found unnecessarily burdensome. Rather than require each arresting officer to recite all procedures in administrative revocation hearings, the Court required notice so as to give the State opportunity to have appropriate law enforcement officers present to testify. Reversed and remanded for further evidence.

**Sufficiency of evidence**

***Boley v. Cline***, 456 S.E.2d 38 (1995) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Blood alcohol tests, No right to, (p. 188) for discussion of topic.

***Dean v. W.Va. Dept. of Motor Vehicles***, 464 S.E.2d 589 (1995) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Chemical test not required, (p. 189) for discussion of topic.

## DUE PROCESS

### Appeal

#### Standard for review

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 544) for discussion of topic.

### Bailiff as witness

***State v. Kelley***, 451 S.E.2d 425 (1994) (McHugh, J.)

See WITNESSES Bailiff as witness, (p. 707) for discussion of topic.

### Delay in investigation

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See RIGHT TO SPEEDY TRIAL Generally, (p. 574) for discussion of topic.

### Evidence missing

#### Consequences of

***State v. Osakalumi***, 461 S.E.2d 504 (1995) (McHugh, C.J.)

See EVIDENCE Missing or unavailable, (p. 281) for discussion of topic.

### Failure to disclose exculpatory evidence

***State v. Franklin***, 448 S.E.2d 158 (1994) (Per Curiam)

See EVIDENCE Exculpatory, Failure to disclose, (p. 270) for discussion of topic.

## DUE PROCESS

### Handwriting

#### Admissibility of

***State v. Jenkins***, 466 S.E.2d 471 (1995) (McHugh, C.J.)

See EVIDENCE Admissibility, Authentication of evidence, (p. 212) for discussion of topic.

### Juveniles

#### Transfer hearing

***In the Matter of Stephfon W.***, 442 S.E.2d 717 (1994) (Miller, J.)

See JUVENILES Preliminary hearing, Purpose of, (p. 441) for discussion of topic.

### Magistrates

#### Non-lawyers as

***State ex rel. Collins v. Bedell***, 460 S.E.2d 636 (1995) (McHugh, C.J.)
(consolidated) ***State ex rel. Peeples v. Knight***, 460 S.E.2d 636 (1995) (McHugh, C.J.)

See MAGISTRATE COURT Appeal from, (p. 454) for discussion of topic.

### Notice of crime

***State ex rel. Morgan v. Trent***, 465 S.E.2d 257 (1995) (Miller, J.)
(consolidated) ***Dean v. Duncil***, 465 S.E.2d 257 (1995) (Miller, J.)

See SEXUAL ATTACKS Sexual assault, Victim's age, (p. 643) for discussion of topic.

## DUE PROCESS

### Right to fair trial

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

See HABEAS CORPUS Distinguished from appeal, (p. 325) for discussion of topic.

### Right to impartial jury

***State v. Derr***, 451 S.E.2d 731 (1994) (Cleckley, J.)

See VENUE Change of venue, Sufficiency of proof for, (p. 698) for discussion of topic.

#### Bailiff as witness

***State v. Kelley***, 451 S.E.2d 425 (1994) (McHugh, J.)

See WITNESSES Bailiff as witness, (p. 707) for discussion of topic.

### Right to speedy trial

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See RIGHT TO SPEEDY TRIAL Generally, (p. 574) for discussion of topic.

### Sentencing

#### Factual determination by judge

***State v. Farmer***, 454 S.E.2d 378 (1994) (McHugh, J.)

See SENTENCING Kidnaping, Factual determination by judge, (p. 629) for discussion of topic.

## DUE PROCESS

### Sufficiency of statute

#### Notice of crime

***State ex rel. Morgan v. Trent***, 465 S.E.2d 257 (1995) (Miller, J.) (consolidated) ***Dean v. Duncil***, 465 S.E.2d 257 (1995) (Miller, J.)

See SEXUAL ATTACKS Sexual assault, Victim's age, (p. 643) for discussion of topic.

### Witness' fees

#### Cross-examination on

***State v. Osakalumi***, 461 S.E.2d 504 (1995) (McHugh, C.J.)

See WITNESSES Experts fees, Cross-examination on, (p. 711) for discussion of topic.

## EIGHTH AMENDMENT

### Commutation of sentence

***Crain v. Bordenkircher***, 454 S.E.2d 108 (1994) (Workman, J.)

See PRISON/JAIL CONDITIONS Generally, (p. 521) for discussion of topic.

### Cruel and unusual punishment

***State v. Lewis***, 447 S.E.2d 570 (1994) (Workman, J.)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 618) for discussion of topic.

### Denial of medical care

***Wilson v. Hun***, 457 S.E.2d 662 (1995) (Per Curiam)

See PRISON/JAIL CONDITIONS Medical care, (p. 522) for discussion of topic.

**ELECTRONIC SURVEILLANCE**

**Consent for**

***State v. Dillon***, 447 S.E.2d 583 (1994) (Workman, J.)

See EVIDENCE Admissibility, Tape recorded statements to informant, (p. 255, 256, 257, 258, 259) for discussion of topic.

## EQUAL PROTECTION

### Right to jury free of racial discrimination

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

Appellant was convicted of sexual assault. His petition for writ of habeas corpus was denied by the circuit court. The prosecuting attorney used a peremptory challenge to strike a black juror from the jury panel. Appellant himself struck another black juror. Appellant contended that he should be considered a member of the same race and therefore prejudiced; he testified that he is "Indian." The trial court ruled that he is not black and was therefore not prejudiced; and that the prosecution offered a racially neutral reason for striking the juror.

Syl. pt. 1 - "It is a violation of the Equal Protection Clause of the Fourteenth Amendment to the *U.S. Constitution* for a member of a cognizable racial group to be tried on criminal charges by a jury from which members of his race have been purposely excluded." Syl. Pt. 1, *State v. Marrs*, 180 W.Va. 693, 379 S.E.2d 497 (1989).

Syl. pt. 2 - "To establish a prima facie case for a violation of equal protection due to racial discrimination in the use of peremptory jury challenges by the State, 'the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.' [Citations omitted.] *Batson v. Kentucky*, 476 U.S. 79 at 96, 106 S.Ct. 1712 at 1722, 90 L.Ed.2d 69 (1986)." Syl. Pt. 2, *State v. Marrs*, 180 W.Va. 693, 379 S.E.2d 497 (1989).

Syl. pt. 3 - "The State may defeat a defendant's prima facie case of a violation of equal protection due to racial discrimination in selection of a jury by providing non-racial, credible reasons for using its peremptory challenges to strike members of the defendant's race from the jury." Syl. Pt. 3, *State v. Marrs*, 180 W.Va. 693, 379 S.E.2d 497 (1989).

## EQUAL PROTECTION

### Right to jury free of racial discrimination (continued)

***State ex rel. Azeez v. Mangum***, (continued)

Syl. pt. 4 - Pursuant to the United States Supreme Court's decision in *Powers v. Ohio*, 499 U.S. 400 (1991), a defendant in a criminal trial can assert a prima facie case of racial discrimination in the use of a peremptory challenge without having to be a member of the same racial group as the prospective juror who was the subject of the state's peremptory challenge. However, *Powers* established a new rule which precludes any retroactive application on collateral review to convictions that became final before *Powers* was announced.

Appellant was convicted before *Powers* was decided. The Court found application of *Powers* impermissible; only *Batson* or *Marrs* could be applied, requiring appellant to be the same race as the struck juror (which he was not). Because the third-party equal protection rule in *Powers* is a new constitutional rule, it cannot be made retroactive.

Even if appellant and the struck juror had been of the same race, the Court found the prosecution offered a racially neutral reason for exercising a peremptory strike. No error.

***State v. Kirkland***, 447 S.E.2d 278 (1994) (Workman, J.)

Appellant was convicted of second-degree murder, malicious assault and attempted murder. Appellant is black. Twenty people were selected to form the jury panel. Four additional people, including one black man, were selected for the alternate jury pool. Because of numerous strikes for cause, one person had to be chosen from the alternate pool. Appellant suggested the black man; the prosecuting attorney did not object.

During *voir dire*, the black man said he knew one of the state's witnesses and that he was familiar with firearms and had no problem with people carrying them. Because of these responses, the prosecuting attorney contacted one of the man's neighbors, a confidential informant and a deputy sheriff. As a result of finding that the man was known as a brawler and had a DUI conviction, the prosecutor used a peremptory strike to exclude him.

**EQUAL PROTECTION**

**Right to jury free of racial discrimination** (continued)

***State v. Kirkland***, (continued)

The trial court found appellant made a prima facie case that the strike was racially motivated; however, the court found the prosecutor's reasons for striking sufficient, denying appellant's request for an evidentiary hearing on the prosecutor's information. Appellant claimed denial of equal protection in that the strike was racially motivated.

Syl. pt. 6 - "It is a violation of the Equal Protection Clause of the Fourteenth Amendment to the *United States Constitution* for a member of a cognizable racial group to be tried on criminal charges by a jury from which members of his race have been purposely excluded." Syl. Pt. 1, *State v. Marrs*, 180 W.Va. 693, 379 S.E.2d 497 (1989).

Syl. pt. 7 - "To establish a prima facie case for a violation of equal protection due to racial discrimination in the use of peremptory jury challenges by the State, 'the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race.' [Citations omitted.] *Batson v. Kentucky*, 476 U.S. 79 at 96, 106 S.Ct. 1712 at 1722, 90 L.Ed.2d 69 (1986)." Syl. Pt. 2, *State v. Marrs*, 180 W.Va. 693, 379 S.E.2d 497 (1989).

Syl. pt. 8 - "The State may defeat a defendant's prima facie case of a violation of equal protection due to racial discrimination in selection of a jury by providing non-racial, credible reasons for using its peremptory challenges to strike members of the defendant's race from the jury." Syl. Pt. 3, *State v. Marrs*, 180 W.Va. 693, 379 S.E.2d 497 (1989).

## EQUAL PROTECTION

**Right to jury free of racial discrimination** (continued)

***State v. Kirkland***, (continued)

Syl. pt. 9 - A trial court should conduct an evidentiary hearing if, after considering the prosecutor's representations regarding the reasons for using a peremptory strike to exclude the only remaining black juror, the court deems that the circumstances surrounding the prosecutor's representations warrant such a hearing to determine whether the explanations offered by the prosecutor in exercising said strike were racially neutral or discriminatory in nature. The determination on whether to conduct an evidentiary hearing is within the sound discretion of the trial court.

The Court found no error in the trial court's findings on the prosecutor's credibility regarding his reasons for striking the black juror. Similarly, no error in the trial court's denial of the evidentiary hearing; since no reasons were given for needing the hearing, it was within the court's discretion to refuse it. No abuse of discretion.

**ERROR**

**Waiver of**

**Failure to object**

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 549) for discussion of topic.

## ETHICS

### Attorneys

***Committee on Legal Ethics v. Clay***, No. 22265 (11/2/94) (Per Curiam)

See ATTORNEY Discipline, Neglect, (p. 85) for discussion of topic.

***Committee on Legal Ethics v. Farber***, 447 S.E.2d 602 (1994) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 95) for discussion of topic.

***Committee on Legal Ethics v. McCorkle***, 452 S.E.2d 377 (1994) (Cleckley, J.)

See ATTORNEYS Discipline, Conviction of crimes, (p. 65) for discussion of topic.

***Committee on Legal Ethics v. Sheatsley***, 452 S.E.2d 75 (1994) (McHugh, J.)

See ATTORNEYS Discipline, Witness' payment contingent on testimony, (p. 104) for discussion of topic.

***Lawyer Disciplinary Board v. Taylor***, 451 S.E.2d 440 (1994) (Per Curiam)

See ATTORNEYS Discipline, Annulment, (p. 55) for discussion of topic.

***Lawyer Disciplinary Board v. Taylor***, 455 S.E.2d 569 (1995) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 67) for discussion of topic.

**Attorneys** (continued)

***W.Va. Continuing Legal Education Commission v. Carbone, et al.***, No. 22693 (3/24/95) (Per Curiam)

See ATTORNEYS Discipline, Continuing education requirements, (p. 65) for discussion of topic.

**Incapacitation**

***Office of Lawyer Disciplinary Counsel v. Karr***, No. 23024 (10/6/95) (Per Curiam)

See ATTORNEYS Incapacitation, Drugs or alcohol, (p. 109) for discussion of topic.

**Misrepresentation on Bar application**

***Lawyer Disciplinary Board v. Kohout***, No. 22629 (4/14/95) (Per Curiam)

See ATTORNEYS Discipline, Misrepresentation on bar application, (p. 84) for discussion of topic.

**Neglect**

***Lawyer Disciplinary Board v. Cunningham***, 464 S.E.2d 181 (1995) (Recht, J.)

See ATTORNEYS Discipline, Failure to settle personal injury matter, (p. 80) for discussion of topic.

**Reinstatement of**

***Lawyer Disciplinary Board v. Pence***, 461 S.E.2d 114 (1995) (Per Curiam)

See ATTORNEYS Discipline, Reinstatement, (p. 97) for discussion of topic.

**ETHICS**

**Attorneys** (continued)

**Reinstatement of** (continued)

***Lawyer Disciplinary Board v. Vieweg***, 461 S.E.2d 60 (1995) (Cleckley, J.)

See ATTORNEYS Discipline, Reinstatement, (p. 99) for discussion of topic.

**Supervision**

***Lawyer Disciplinary Board v. Beveridge***, 459 S.E.2d 542 (1995) (Per Curiam)

See ATTORNEYS Discipline, Failure to respond to bar counsel, (p. 75) for discussion of topic.

**Campaign violations**

***In the Matter of Mendez***, 450 S.E.2d 646 (1994) (Per Curiam)

See MAGISTRATE COURT Discipline, Campaign violations, (p. 458) for discussion of topic.

**Conviction of crimes**

***Committee on Legal Ethics v. Sydnor***, 450 S.E.2d 638 (1994) (Per Curiam)

See ATTORNEYS Discipline, Commission of crime, (p. 60) for discussion of topic.

***Lawyer Disciplinary Board v. Taylor***, 455 S.E.2d 569 (1995) (Per Curiam)

See ATTORNEYS Discipline, Conviction of crimes, (p. 67) for discussion of topic.

## ETHICS

### Incapacitation

***Office of Lawyer Disciplinary Counsel v. Karr***, No. 23024 (10/6/95) (Per Curiam)

See ATTORNEYS Incapacitation, Drugs or alcohol, (p. 109) for discussion of topic.

### Judges

***Committee on Legal Ethics v. Karl***, 449 S.E.2d 277 (1994) (McHugh, J.)

See ATTORNEYS Discipline, Neglect, (p. 85) for discussion of topic.

***In the Matter of Hey***, 457 S.E.2d 509 (1995) (Per Curiam)

See JUDGES Discipline, Sexual harassment, (p. 405) for discussion of topic.

***In the Matter of Starcher***, 457 S.E.2d 147 (1995) (Per Curiam)

See JUDGES Discipline, *Ex parte* communications, (p. 400) for discussion of topic.

### Magistrates

***In the Matter of Browning***, 452 S.E.2d 34 (1994) (Cleckley, J.)

See MAGISTRATE COURT Discipline, Domestic violence, (p. 459) for discussion of topic.

***State ex rel. Brown v. Dietrick***, 444 S.E.2d 47 (1994) (Miller, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 579) for discussion of topic.

**ETHICS**

**Magistrates** (continued)

**Alcoholism**

***In the Matter of Queen***, No. 23102 (12/7/95) (Per Curiam)

See MAGISTRATE COURT Discipline, Alcoholism, (p. 458) for discussion of topic.

**Duty to find replacement**

***In the Matter of Witherell***, No. 21978 (11/18/94) (Per Curiam)

See MAGISTRATE COURT Discipline, Failure to find replacement, (p. 462) for discussion of topic.

**Indictment of**

***In the Matter of Atkinson***, 456 S.E.2d 202 (1995) (Per Curiam)

See MAGISTRATE COURT Discipline, Indictment for crime, (p. 463) for discussion of topic.

**Relationship with clerk**

***In the Matter of Minigh***, No. 22665 (12/15/95) (Per Curiam)

See MAGISTRATE COURT Discipline, Relationship with clerk, (p. 465) for discussion of topic.

**Neglect**

***Committee on Legal Ethics v. Karl***, 449 S.E.2d 277 (1994) (McHugh, J.)

See ATTORNEYS Discipline, Neglect, (p. 85) for discussion of topic.

**Neglect** (continued)

***Lawyer Disciplinary Board v. Cunningham***, 464 S.E.2d 181 (1995) (Recht, J.)

See ATTORNEYS Discipline, Failure to settle personal injury matter, (p. 80) for discussion of topic.

**Polling place violation**

***In the Matter of Harshbarger***, 450 S.E.2d 667 (1994) (Per Curiam)

See MAGISTRATE COURT Discipline, Election violations, (p. 462) for discussion of topic.

**Prohibition against ethics proceedings**

***State ex rel. Scales v. Committee on Legal Ethics***, 446 S.E.2d 729 (1994) (Per Curiam)

See PROHIBITION Ethics proceedings, (p. 534) for discussion of topic.

**Recusal**

**Prosecuting attorney**

***State ex rel. Tyler v. MacQueen***, 447 S.E.2d 289 (1994) (Workman, J.)

See PROSECUTING ATTORNEYS Disqualification, Prior relationship with accused, (p. 552) for discussion of topic.

## EVIDENCE

### Admissibility

#### Authentication of evidence

***State v. Jenkins***, 466 S.E.2d 471 (1995) (McHugh, C.J.)

Appellant was convicted of uttering a forged check. Appellant signed a check with the name Emerson Herrod in the presence of a grocery store clerk. The real Emerson Herrod testified that he did not sign the check and that the account was closed. Police testified that the driver's license number written on the check was neither appellant's nor Mr. Herrod's number.

Appellant testified she had never been in the grocery store and had not signed the check. The issue was whether the trial judge erred in refusing to admit into evidence appellant's handwritten exemplar given while she was testifying. The judge stated that jurors were not handwriting experts and that people "who are involved in forgery....usually try to disguise their signatures."

Syl. pt. 1 - Preliminary questions of authentication and identification pursuant to *W.Va.R.Evid.* 901 are treated as matters of conditional relevance, and, thus, are governed by the procedure set forth in *W.Va.R.Evid.* 104(b). In an analysis under *W.Va.R.Evid.* 901 a trial judge must find that the party offering the evidence has made a *prima facie* showing that there is sufficient evidence "to support a finding that the matter in question is what its proponent claims." In other words, the trial judge is required only to find that a reasonable juror could find in favor of authenticity or identification before the evidence is admitted. The trier of fact determines whether the evidence is credible. Furthermore, a trial judge's ruling on authenticity will not be disturbed on appeal unless their has been an abuse of discretion. Lastly, a finding of authenticity does not guarantee that the evidence is admissible because the evidence must also be admissible under any other rule of evidence which is applicable.

**EVIDENCE**

**Admissibility** (continued)

**Authentication of evidence** (continued)

***State v. Jenkins***, (continued)

Syl. pt. 2 - " ' " 'Rulings on the admissibility of evidence are largely within a trial court's sound discretion and should not be disturbed unless there has been an abuse of discretion.' *State v. Louk*, 171 W.Va. 639, 301 S.E.2d 596, 599 (1983)." Syllabus Point 2, *State v. Peyatt*, 173 W.Va. 317, 315 S.E.2d 574 (1983).' Syllabus point 7, *State v. Miller*, 175 W.Va. 616, 336 S.E.2d 910 (1985)." Syl. pt. 10, *Board of Education v. Zando, Martin & Milstead, Inc.*, 182 W.Va. 597, 390 S.E.2d 796 (1990).

Syl. pt. 3 - While ordinarily rulings on the admissibility of evidence are largely within the trial judge's sound discretion, a trial judge man not make an evidentiary ruling which deprives a criminal defendant of certain rights, such as the right to examine witnesses against him or her, to offer testimony in support of his or her defense, and to be represented by counsel, which are essential for a fair trial pursuant to the due process clause found in the Fourteenth Amendment of the *Constitution of the United States* and article III, § 14 of the *West Virginia Constitution*.

Syl. pt. 4 - "Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction." Syl. pt. 20, *State v. Thomas*, 157 W.Va. 640 , 203 S.E.2d 445 (1974).

Appellant claimed she was not offering her handwriting to prove the check was not forged; she claimed it was offered to show that the clerk wrongly identified her as the person who uttered the check.

The Court noted that Rule 901 of the *Rules of Evidence* requires the trial judge to inquire as to whether a prima facie case has been made by the party offering the evidence; the trier of fact then determines whether the evidence is authentic and what weight should be given to it (assuming other tests of hearsay, relevance, etc. have been passed). The procedure is to be governed by Rule 104(b).

**EVIDENCE**

**Admissibility** (continued)

**Authentication of evidence** (continued)

***State v. Jenkins***, (continued)

The Court found the handwriting sample relevant under Rules 401 and 402; only Rule 403 could exclude the evidence. To arbitrarily exclude the evidence would violate due process. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). See also, *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979); and *Crane v. Kentucky*, 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986). Further, this exclusion was not harmless error. Reversed and remanded.

**Blood alcohol tests**

***State ex rel. Allen v. Bedell***, 454 S.E.2d 77 (1994) (Workman, J.)

See DRIVING UNDER THE INFLUENCE Blood alcohol tests, (p. 187) for discussion of topic.

**Blood tests**

***State ex rel. David Allen B. v. Sommerville***, 459 S.E.2d 363 (1995) (Recht, J.)

See PATERNITY Blood tests, When required, (p. 495) for discussion of topic.

**Chain of custody**

***State v. Day***, 447 S.E.2d 576 (1994) (Per Curiam)

See IDENTIFICATION In court, Admissibility, (p. 346) for discussion of topic.

**EVIDENCE**

**Admissibility** (continued)

**Collateral crimes**

***State v. Farmer***, 445 S.E.2d 759 (1994) (Per Curiam)

Appellant was convicted of first-degree murder with mercy, kidnaping and conspiracy. At trial, appellant's main defense was that he was afraid of his co-defendant and committed the crimes out of duress.

Evidence was admitted of the co-defendant's stabbing of the same victim two years earlier, along with testimony regarding several outstanding warrants against the co-defendant. Defendant acknowledged on cross-examination that he was aware of the earlier stabbing. The trial court gave a cautionary instruction that prior crimes by the co-defendant could only be considered for purposes of showing knowledge, purpose, motive and lack of mistake or accident on appellant's part. No error.

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See EVIDENCE Impeachment, Criminal conviction, (p. 279) for discussion of topic.

***State v. Malick***, 457 S.E.2d 482 (1995) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 215) for discussion of topic.

***State v. Malick***, 457 S.E.2d 482 (1995) (Per Curiam)

Appellant was found guilty of first-degree sexual assault. At trial the court granted a motion in limine excluding evidence of another sexual assault against the victim which resulted in a guilty plea by another defendant. Appellant claimed the other crime was relevant in that the assault took place the same month as that alleged against appellant.

**EVIDENCE**

**Admissibility** (continued)

**Collateral crimes** (continued)

***State v. Malick***, (continued)

Syl. pt. 1 - "For evidence of the guilt of someone other than the accused to be admissible, it must tend to demonstrate that the guilt of the other party is inconsistent with that of the defendant." Syl. Pt. 5, *State v. Frasher*, 164 W.Va. 572, 265 S.E.2d 43 (1980).

Syl. pt. 2 - "In a criminal case, the admissibility of testimony implicating another party as having committed the crime hinges on a determination of whether the testimony tends to directly link such party to the crime, or whether it is instead purely speculative. Consequently, where the testimony is merely that another person had a motive or opportunity or prior record of criminal behavior, the inference is too slight to be probative, and the evidence is therefore inadmissible. Where, on the other hand, the testimony provides a direct link to someone other than the defendant, its exclusion constitutes reversible error." Syl. Pt. 1, *State v. Harman*, 165 W.Va. 494, 270 S.E.2d 146 (1980).

Here, the Court found the other person's guilt was not inconsistent with appellant's guilt. No error.

***State v. McGhee***, 455 S.E.2d 533 (1995) (Per Curiam)

Appellant was convicted of carrying a concealed weapon. He claimed he was prejudiced by the prosecution's references during opening and closing arguments to brandishing a weapon, a concomitant charge which was severed and on which appellant was found not guilty.

Syl. pt. 1 - "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. *W.Va.R.Evid*. 404(b)." Syllabus Point 1, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

**EVIDENCE**

**Admissibility** (continued)

**Collateral crimes** (continued)

***State v. McGhee***, (continued)

Syl. pt. 2 - "Other criminal act evidence admissible as part of the *res gestae* or same transaction introduced for the purpose of explaining the crime charged must be confined to that which is reasonably necessary to accomplish such purpose." Syllabus Point 1, *State v. Spicer*, 162 W.Va. 127, 245 S.E.2d 922 (1978).

Syl. pt. 3 - "When offering evidence under Rule 404(b) of the *West Virginia Rules of Evidence*, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction." Syllabus Point 1, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

Syl. pt. 4 - "Where an offer of evidence is made under Rule 404(b) of the *West Virginia Rules of Evidence*, the trial court, pursuant to Rule 104(a) of the *West Virginia Rules of Evidence*, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the *West Virginia Rules of Evidence* and conduct the balancing required under Rule 403 of the *West Virginia Rules of Evidence*. If the trial court is then satisfied

**EVIDENCE**

**Admissibility** (continued)

**Collateral crimes** (continued)

***State v. McGhee***, (continued)

that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence." Syllabus Point 2, *State v. McGinnis*, 193 W.Va. 147, 455 S.E.2d 516 (1994).

The Court noted collateral crimes are allowed to show context or to complete the story. Here, the mention of brandishing was for the purpose of providing "background" which explained the police's stopping appellant. The prosecutor noted in closing argument that brandishing was neither the issue nor the current charge. No abuse of discretion in admitting.

Although appellant claimed surprise at the mention of the brandishing, the Court noted the defense did not request additional preparation time. No prejudice was shown. No error.

***State v. McGinnis***, 455 S.E.2d 516 (1994) (Cleckley, J.)

Appellant was convicted of first-degree murder. During the grand jury session at which he was indicted for murder, he was also indicted for embezzlement; appellant pled guilty the same month to federal charges of mail fraud involving five to six million dollars.

Following severance of charges, the state pursued the embezzlement charges first. At the subsequent trial for murder the prosecution made extensive use of collateral crimes evidence, including a substantial part of opening argument and three full days of trial (fifteen witnesses discussed collateral crimes) and extensive references in both opening and closing statements. Counsel made frequent objections to most of the testimony and asked for limiting instructions after the first four witnesses; limiting instructions were given. The State argued that all of this evidence fit within Rule 404(b) of the

***State v. McGinnis***, (continued)

*Rules of Evidence* to show motive and appellant's propensity for portraying himself in a sympathetic light. The collateral crimes referenced were infidelity, embezzlement, arson, tax fraud and other bad debts; several of the alleged crimes had not been tried, resulting in trials within the murder trial.

Syl. pt. 1 - When offering evidence under Rule 404(b) of the *West Virginia Rules of Evidence*, the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose. It is not sufficient for the prosecution or the trial court merely to cite or mention the litany of possible uses listed in Rule 404(b). The specific and precise purpose for which the evidence is offered must clearly be shown from the record and that purpose alone must be told to the jury in the trial court's instruction.

Syl. pt. 2 - Where an offer of evidence is made under Rule 404(b) of the *West Virginia Rules of Evidence*, the trial court, pursuant to Rule 104(a) of the *West Virginia Rules of Evidence*, is to determine its admissibility. Before admitting the evidence, the trial court should conduct an *in camera* hearing as stated in *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986). After hearing the evidence and arguments of counsel, the trial court must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts. If the trial court does not find by a preponderance of the evidence that the acts or conduct was committed or that the defendant was the actor, the evidence should be excluded under Rule 404(b). If a sufficient showing has been made, the trial court must then determine the relevancy of the evidence under Rules 401 and 402 of the *West Virginia Rules of Evidence* and conduct the balancing required under Rule 403 of the *West Virginia Rules of Evidence*. If the trial court is then satisfied that the Rule 404(b) evidence is admissible, it should instruct the jury on the limited purpose for which such evidence has been admitted. A limiting instruction should be given at the time the evidence is offered, and we recommend that it be repeated in the trial court's general charge to the jury at the conclusion of the evidence.

**EVIDENCE**

**Admissibility** (continued)

**Collateral crimes** (continued)

***State v. McGinnis***, (continued)

The Court found no logical nexus between the "massive" Rule 404(b) evidence and the issues relevant to the murder. The only relevant evidence allowable under Rules 401 and 402 that also met Rule 403 balancing test for prejudice was the evidence of the fire in appellant's office which destroyed records relevant to a pending criminal tax evasion investigation two days before an IRS agent was to have visited the office.

The Court was especially troubled by the evidence of embezzlement, especially in light of the prosecution's agreement to severing the original charges. See *State v. Spicer*, 162 W.Va. 127, 245 S.E.2d 922 (1978). Substantial prejudice resulted in admitting this evidence, especially when added to the evidence of the mail fraud convictions also introduced. Any inference as to motive to kill his wife (who presumably had knowledge) is dramatically reduced by the spousal privilege in *W.Va. Code*, 57-3-3. Evidence of failure to file state income tax returns was similarly prejudicial and irrelevant.

To compound the error, the trial court did not engage in the required Rule 403 balancing. See *Arnoldt v. Ashland Oil, Inc.*, 186 W.Va. at 408, 412 S.E.2d 795 at 809 (1991). The impermissible cumulative prejudicial effect required reversal. See *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974); also, *State v. Messer*, 166 W.Va. 806, 277 S.E.2d 634 (1981); and *State v. Walker*, 188 W.Va. 661, 425 S.E.2d 616 (1992).

**Confessions**

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 597) for discussion of topic.

**EVIDENCE**

**Admissibility** (continued)

**Confessions** (continued)

***State v. Buzzard***, 461 S.E.2d 50 (1995) Workman, J.)

See SEARCH AND SEIZURE Warrantless search, Consent to, (p. 584) for discussion of topic.

***State v. Farley***, 452 S.E.2d 50 (1994) (Cleckley, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 599) for discussion of topic.

***State v. Honaker***, 454 S.E.2d 96 (1994) (Cleckley, J.)

See CONFESSIONS Voluntariness, (p. 153) for discussion of topic.

***State v. Hopkins***, 453 S.E.2d 317 1994) (Neely, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 602) for discussion of topic.

***State v. Jones***, 456 S.E.2d 459 (1995) (Cleckley, J.)

See SELF-INCRIMINATION Statements by defendant, (p. 594) for discussion of topic.

***State v. Moore***, 457 S.E.2d 801 (1995) (Neely, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Voluntariness, Intelligence a factor, (p. 608) for discussion of topic.

**EVIDENCE**

**Admissibility** (continued)

**Dying declaration**

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

Appellant was convicted of first-degree murder. According to the testimony of two witnesses, Glen Thomas and Bucky Moore, appellant and his half-brother said they were going to rob the victim. Appellant and his half-brother allegedly told Moore and Thomas that during the robbery the half-brother told the victim appellant's name, resulting in a beating until the victim died.

An ax handle with the victim's hair and a rifle belonging to the victim were found, along with appellant's bloodied clothes. Other witnesses testified that two men were seen walking near the victim's house; their apparel matched the witnesses' clothes. Others, however, specifically identified appellant. The only identifiable fingerprints at the crime scene were the victims'; blood evidence was contradictory.

Defense counsel aggressively cross-examined Moore, suggesting that Moore was the murderer. Before trial began the next day Moore committed suicide. Moore had testified that he went to Del Viocent's house the night of the murder but Vincent testified after the suicide that Moore was not at his house and that Moore had asked him to provide an alibi. According to Vincent, Moore had also bragged about killing people.

Because of appellant's attack on Moore's credibility after his death, Moore's suicide note was admitted to evidence. The note said "I didn't kill Harper and I won't do time for something that I didn't do. I'm sorry but I just can't take the presure (sic) of going through a trial...."

Syl. pt. 1 - "What is required for a dying declaration to be admissible is that the declarant have such a belief that he is facing death as to remove ordinary worldly motives for misstatement. In that regard, the court may consider the totality of the circumstances of motive to falsify and the manner in which the statement was volunteered or elicited." Syl. pt. 3, *State v. Young*, 166 W.Va. 309, 273 S.E.2d 592 (1980), *holding modified on a different ground* by *State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991).

**EVIDENCE**

**Admissibility** (continued)

**Dying declaration** (continued)

***State v. Satterfield***, (continued)

Syl. pt. 2 - A suicide note may be admissible pursuant to *W.Va.R.Evid*. 804 (b) (2) as a dying declaration exception to the hearsay rule. In order for a statement found in a suicide note to be admissible as a dying declaration the following must occur: the statement must have been made when the declarant was under the belief that his death was imminent, and the dying declaration must concern the cause or circumstances of what the declarant believes to be his impending death.

Syl. pt. 3 - Once a trial judge determines that a statement falls within the dying declaration exception to the hearsay rule found in *W.Va.R.Evid*. 804 (b) (2), then it must be determined whether the evidence is relevant pursuant to *W.Va.R.Evid*. 401 and 402 and, if so, whether its probative value is substantially outweighed by unfair prejudice pursuant to *W.Va.R.Evid.* 403. The statement is admissible only after the trial judge determines that its probative value is not substantially outweighed by unfair prejudice.

The Court noted evidence otherwise admissible should not be excluded under a Rule 403 analysis because the judge does not find the evidence credible. The note here was a dying declaration because the declarant was facing imminent death and the note explained the circumstances leading to his death. No error.

**Excited utterance**

***State v. Sutphin***, 466 S.E.2d 402 (1995) (Recht, J.)

See EVIDENCE Admissibility, Hearsay, (p. 235) for discussion of topic.

**EVIDENCE**

**Admissibility** (continued)

**Expert opinion**

***Gentry v. Mangum***, 466 S.E.2d 171 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Scientific evidence, (p. 250) for discussion of topic.

***Mayhorn v. Logan Medical Foundation***, 454 S.E.2d 87 (1994) (McHugh, J.)

See EVIDENCE Expert witnesses, Admissibility of opinion, (p. 271) for discussion of topic.

***Mildred L.M. v. John O.F.***, 452 S.E.2d 436 (1994) (Cleckley, J.)

See PATERNITY Blood tests, When conclusive, (p. 492) for discussion of topic.

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

See EVIDENCE Expert witnesses, Admissibility of opinion, (p. 274) for discussion of topic.

***State v. Wood***, 460 S.E.2d 771 (1995) (McHugh, C.J.)

Appellant was convicted of sexual abuse and incest of a minor child. At trial, a social worker was qualified as expert in sexual abuse and was allowed to testify as to the victim's fitting a "sexual abuse profile" and the truthfulness of her allegations. No objection was made at trial.

Syl. pt. 1 - "To trigger application of the 'plain error' doctrine, there must be (1) an error, (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

**EVIDENCE**

**Admissibility** (continued)

**Expert opinion** (continued)

***State v. Wood***, (continued)

Syl. pt. 3 - "Expert psychological testimony is permissible in cases involving incidents of child sexual abuse and an expert may state an opinion as to whether the child comports with the psychological and behavioral profile of a child sexual abuse victim, and may offer an opinion based on objective findings that the child has been sexually abused. Such an expert may not give an opinion as to whether he personally believes the child, nor an opinion as to whether the sexual assault was committed by the defendant, as these would improperly and prejudicially invade the province of the jury." Syl. pt. 7, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990).

Syl. pt. 4 - " ' " ' "Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused." Point 5, syllabus, *Overton v. Fields*, 145 W.Va. 797 117 S.E.2d 598 (1960).' Syllabus Point 4, *Hall v. Nello Teer Co.*, 157 W.Va. 582, 203 S.E.2d 145 (1974)." Syllabus Point 12, *Board of Education v. Zando, Martin & Milstead*, 182 W.Va. 597, 390 S.E.2d 796 (1990).' Syl. pt. 3, *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993)." Syl. pt. 5, *Mayhorn v. Logan Medical Foundation*, 193 W.Va. 42, 454 S.E.2d 87 (1994).

The Court found the social worker to be properly qualified as an expert based on her experience and training. Further, the Court found the fairness of the trial was not affected by the testimony, especially in light of the social worker's admission that she would have had no way to determine if the victim were lying. The Court refused to consider the admission under the plain error doctrine because it did not seriously affect the fairness of the trial. No error.

Further, the Court rejected appellant's allegations that admission of the sexual abuse profile was error. *See* syl. pt. 3, above; also, Rule 702, *W.Va.R.Evid.*

**Admissibility** (continued)

**Extrajudicial statements**

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

See SIXTH AMENDMENT Right to counsel, Admissibility of extrajudicial statements, (p. 649) for discussion of topic.

***State v. Mason***, 460 S.E.2d 36 (1995) (Cleckley, J.)

Appellant was convicted of first-degree murder. The night of the murder, appellant and three others, Rodney Canfield, William Davis and the victim, Timoth Sanders, having drunk beer for some period at appellant's house, drove the victim's car to a remote area where appellant allegedly shot the victim in the head. He handed the gun to Canfield and told him to shot; it is disputed whether Canfield fired the gun.

The victim was able to flee into the woods. Davis also ran; he later testified he was afraid. Appellant and Canfield returned to appellant's house in the victim's car. After retrieving a flashlight, they returned to the area where either appellant or Canfield shot the victim two more times. They then put the victim's body in the car and returned to appellant's house.

Robert Wasson, Jr., told police he arrived at appellant's house before appellant returned for the flashlight. He claimed he was asked to follow appellant and Canfield in his vehicle. The two then drove to Maryland to dispose of the body and took the victim's car to another location where they burned it. The police took other statements from Canfield and Davis, all of which was introduced at trial.

Canfield and Davis invoked their Fifth Amendment rights and Wasson was unavailable for medical reasons. Prior to trial Davis was given transactional immunity and testified but neither Canfield nor Wasson were present at trial. A state police sergeant testified at the pre-trial hearing that he believed Davis' and Wasson's statements but questioned Canfield's veracity. The trial court admitted all of the statements as exceptions to hearsay under Rule 804(b)(3) of the *Rules of Evidence*, declarations against interest.

**EVIDENCE**

**Admissibility** (continued)

**Extrajudicial statements** (continued)

***State v. Mason***, (continued)

Syl. pt. 1 - The mission of the Confrontation Clause found in the Sixth Amendment of the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* is to advance a practical concern for the accuracy of the truth-determining process in criminal trials, and the touchstone is whether there has been a satisfactory basis for evaluating the truth of the prior statement. An essential purpose of the Confrontation Clause is to ensure an opportunity for cross-examination. In exercising this right, an accused may cross-examine a witness to reveal possible biases, prejudices, or motives.

Syl. pt. 2 - "The two central requirements for admission of extrajudicial testimony under the Confrontation Clause contained in the Sixth Amendment to the *United States Constitution* are: (1) demonstrating the unavailability of the witness to testify; and (2) proving the reliability of the witness's out-of-court statement." Syllabus Point 2, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

Syl. pt. 3 - "In order to satisfy its burden of showing that the witness is unavailable, the State must prove that is has made a good-faith effort to obtain the witness's attendance at trial. This showing necessarily requires substantial diligence." Syllabus Point 3, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

Syl. pt. 4 - "Even though the unavailability requirements has been met, the confrontation Clause contained in the Sixth Amendment to the *United States Constitution* mandates the exclusion of evidence that does not bear adequate indicia of reliability. Reliability can unusual be inferred where the evidence falls within a firmly rooted hearsay exception." Syllabus Point 5, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

**EVIDENCE**

**Admissibility** (continued)

**Extrajudicial statements** (continued)

***State v. Mason***, (continued)

Syl. pt. 5 - "Generally, out-of-court statements made by someone other that the declarant while testifying are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action; 2) the statement is not hearsay under the rules [exemptions under Rule 801(d)]; or 3) the statement is hearsay but falls within an exception provided for in the rules [exceptions under Rules 803 and 804]." Syllabus Point 1, *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990).

Syl. pt. 6 - For purposes of Confrontation Clause found in the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution*, no independent inquiry into reliability is required when the evidence falls within a firmly rooted hearsay exception.

Syl. pt. 7 - When ruling upon the admission of a narrative under Rule 804(b)(3) of the *West Virginia Rules of Evidence*, a trial court must break the narrative down and determine the separate admissibility of each single declaration or remark. This exercise is a fact-intensive inquiry that requires careful examination of all the circumstances surrounding the criminal activity involved.

Syl. pt. 8 - To satisfy the admissibility requirements under Rule 804(b) 3 of the *West Virginia Rules of Evidence*, a trial court must determine: (a) The existence of each separate statement in the narrative; (b) whether each statement was against the penal interest of the declarant; (c) whether corroborating circumstances exist indicating the trust-worthiness of the statement; and (d) whether the declarant is unavailable.

**EVIDENCE**

**Admissibility** (continued)

**Extrajudicial statements** (continued)

***State v. Mason***, (continued)

Syl. pt. 9 - Absent a showing of particularized guarantees of trustworthiness, the admission of a third-party confession implicating a defendant violates the Confrontation Clause found in the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution*. The burden is squarely upon the prosecution to establish the challenged evidence is so trustworthy that adversarial testing would add little to its reliability. Furthermore, unless an affirmative reason arising from the circumstances in which the statement was made provides a basis for rebutting the presumption that a hearsay statement is not worthy of reliance at trial, the Confrontation Clause requires exclusion of the out-of-court statement.

Syl. pt. 10 - Even if the hearsay does not fit within an established exception, its admissibility is not barred by the Confrontation Clause found in the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* if, considered apart from any corroborating evidence, there is a showing of particularized guarantees of trustworthiness. Consideration should be given to the totality of the circumstances that surround the making of the statement and that render the declarant particularly worthy of belief--so worthy of belief that the test of cross-examination would be a work of supererogation. The guarantees of trustworthiness must be at least as reliable as evidence admitted under a firmly rooted hearsay exception. An affirmative reason, arising from the circumstances in which the statement was made, is necessary to rebut the presumption of unreliability and exclusion under the Confrontation Clause.

Syl. pt. 11 - A trial court specifically must examine whether the circumstances existing at the time a declarant gives a statement make the statement particularly worthy of belief so that the test of cross-examination would have been a work of supererogation. As no mechanical test prevails, the character of the guarantees of trustworthiness must be weighed.

**EVIDENCE**

**Admissibility** (continued)

**Extrajudicial statements** (continued)

***State v. Mason***, (continued)

The Court noted the trial court must analyze the statements' admissibility under both the Confrontation Clause and the hearsay exception. The Court noted only a harmless error analysis or failure to object, necessitating plain error, can avoid reversal when the Confrontation Clause is violated. The critical question is whether an opportunity has been given to test the truthfulness of a statement.

Rule 804(b)(3) changed common law so as to create an exception to the inadmissibility of an unavailable witness' declarations. Despite the broad declaration in Syllabus Point 6, the Court noted that *Williamson v. United States*, 114 S.Ct. 2431, 129 L.Ed.2d 476 (1994) is more cautious, refusing to decide whether the hearsay exception is "firmly rooted" and skipping the issue whether the statements there were inadmissible under the Confrontation Clause.

The Court retained both a Confrontation Clause and hearsay exception analysis and found the trial court did not analyze each statement for veracity. Importantly, the declarants were not subject to cross-examination and their lawyers were not present during their interrogation. Although not deciding that Rule 804(b)(3) is "firmly rooted," the Court directed the trial court on remand to evaluate the statements as if it were. The hearsay must be reliable by virtue of *inherent* trustworthiness (emphasis in original). The prosecution must establish that cross-examination would add nothing. Reversed and remanded.

***State v. Osakalumi***, 461 S.E.2d 504 (McHugh, C.J.)

Appellant was convicted of first-degree murder. At trial the victim's mother's statements made during the trial of a co-defendant were read into the record. Appellant claimed his right to confront his accuser was abrogated.

**EVIDENCE**

**Admissibility** (continued)

**Extrajudicial statements** (continued)

***State v. Osakalumi***, (continued)

During pre-trial motions the prosecution indicated the witness was unavailable. Appellant's counsel made no objection at that time except to note he objected to a particular name appearing; he did object generally at trial.

Syl. pt. 3 - "This Court will not consider an error which is not preserved in the record nor apparent on the face of the record." Syl. pt. 6, *State v. Byers*, 159 W.Va. 596, 224 S.E.2d 726 (1976).

See also, Cleckley, *Handbook on Evidence for West Virginia Lawyers*, Sec. 1-7(c)(2), p. 77 (3d Ed. 1994). Specifying grounds to objection excludes other possible grounds.

***State v. Phillips***, 461 S.E.2d 75 (1995) (Cleckley, J.)

See RIGHT TO CONFRONT Admissibility of extrajudicial statements, (p. 566) for discussion of topic.

***State v. Shepherd***, 442 S.E.2d 440 (1994) (Per Curiam)

See BURDEN OF PROOF Witness unavailable, (p. 133) for discussion of topic.

**Foundation for DUI sobriety check points**

***Carte v. Cline***, 460 S.E.2d 48 (1995) (Fox, J.)

See DRIVING UNDER THE INFLUENCE Sobriety check points, Notice of intent to challenge, (p. 193) for discussion of topic.

**Admissibility** (continued)

**Gender prejudice**

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 544) for discussion of topic.

**Gruesome photographs**

***State v. Derr***, 451 S.E.2d 731 (1994) (Cleckley, J.)

See EVIDENCE Admissibility, Photographs, (p. 243) for discussion of topic.

**Handwriting exemplars**

***State v. Jenkins***, 466 S.E.2d 471 (1995) (McHugh, C.J.)

See EVIDENCE Admissibility, Authentication of evidence, (p. 212) for discussion of topic.

**Hearsay**

***Hamilton v. Ravasio***, 451 S.E.2d 749 (1994) (Per Curiam)

(**NOTE**: While not a criminal matter, this case is included because of its relevance to evidentiary issues.)

During the trial of this civil action for negligence in an automobile accident the circuit court refused to allow plaintiff's wife to testify as to plaintiff's statements to her regarding the accident. Plaintiff had suffered another, unrelated injury resulting in memory loss. Upon motion to continue, it was ruled that his memory was unlikely to improve and the motion was refused. A witness at the scene was added by plaintiff late in the process; a continuance was refused following the court's ruling that the witness could not testify because her identity was not provided to the defense ten days before the trial.

**EVIDENCE**

**Admissibility** (continued)

**Hearsay** (continued)

***Hamilton v. Ravasio***, (continued)

Plaintiff argued Rules 803(24) and 804(b)(5) of the Rules of Evidence allowed his wife's testimony. The circuit court found plaintiff's wife to be a party in interest and therefore her testimony unreliable as to matters about which she had no personal knowledge.

Syl. pt. 1 - "The language of Rule 804(b)(5) of the *West Virginia Rules of Evidence* and its counterpart in Rule 803(24) requires that five general factors must be met in order for hearsay evidence to be admissible under the rules. First and most important is the trustworthiness of the statement, which must be equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule. Second, the statement must be offered to prove a material fact. Third, the statement must be shown to be more probative on the issue for which it is offered than any other evidence the proponent can reasonably procure. Fourth, admission of the statement [sic] must comport with the general purpose of the rules of evidence and the interest of justice. Fifth, adequate notice of the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence." Syllabus Point 5, *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987).

Syl. pt. 2 - " 'The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.' Syllabus Point 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955)." Syllabus Point 4, *State v. Ashcraft*, 172 W.Va. 640, 309 S.E.2d 600 (1983).

Syl. pt. 3 - "A motion for continuance is addressed to the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless there is a showing that there has been an abuse of discretion." Syllabus Point 2, *State v. Bush*, 163 W.Va. 168, 255 S.E.2d 539 (1979).

**EVIDENCE**

**Admissibility** (continued)

**Hearsay** (continued)

***Hamilton v. Ravasio***, (continued)

Syl. pt. 4 - "Whether there has been an abuse of discretion in denying a continuance must be decided on a case-by-case basis in light of the factual circumstances presented, particularly the reasons for the continuance that were presented to the trial court at the time the request was denied." Syllabus Point 3, *State v. Bush*, 163 W.Va. 168, 255 S.E.2d 539 (1979).

The Court noted that the necessary assurances of trustworthiness must come from the totality of the circumstances. The statements relayed through another witness must be so trustworthy that "cross-examination would be of marginal utility. *State v. James Edward S.*, 184 W.Va. 408 at 415, 400 S.E.2d 843 at 850 (1990), *quoting Idaho v. Wright*, 497 U.S. 805 at 820, 110 S.Ct. 3139 at 3149, 111 L.Ed.2d 638 at 655 (1990). See also, *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987).

The Court found no abuse of discretion in either the hearsay ruling or the refusal to grant a continuance because of plaintiff's memory problems. The Court did find a continuance should have been granted because of plaintiff's last-minute attempt to add an additional witness. Reversed and remanded.

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

See SIXTH AMENDMENT Right to counsel, Admissibility of extrajudicial statements, (p. 649) for discussion of topic.

***State v. Dillon***, 447 S.E.2d 583 (1994) (Workman, J.)

See EVIDENCE Admissibility, Tape recorded statements to informant, (p. 255, 256, 257, 258, 259) for discussion of topic.

***State v. Jarrell***, 442 S.E.2d 223 (1994) (Brotherton, J.)

See EVIDENCE Admissibility, Tape recorded statements to police, (p. 259) for discussion of topic.

***State v. Mason***, 460 S.E.2d 36 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Extrajudicial statements, (p. 226) for discussion of topic.

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See EVIDENCE Admissibility, Dying declaration, (p. 222) for discussion of topic.

***State v. Sutphin***, 466 S.E.2d 402 (1995) (Recht, J.)

Appellant was convicted of second-degree murder. The victim's father testified that he was told by the victim that appellant threatened to kill her if she left him again. The victim made this statement to her father immediately following an encounter with appellant which left her "scared," "nervous" and "shaking" according to the father's testimony.

The prosecution maintained the testimony was admissible in that it was an admission, therefore not hearsay under *W.Va.R.Evid.* 801(d)(2). If hearsay, the prosecution claimed the testimony was still admissible as state of mind exception pursuant to Rule 803(3).

Syl. pt. 4 - Under *W.Va.R.Evid.* 805, hearsay included within hearsay is admissible if each level of hearsay comports with one of the exceptions to the hearsay rule.

**EVIDENCE**

**Admissibility** (continued)

**Hearsay** (continued)

***State v. Sutphin***, (continued)

Syl. pt. 5 - A threat to commit an act in the future, if made by the declarant/ party and offered against the party, is not hearsay under *W.Va.R.Evid*. 801(d)(2).

Syl. pt. 6 - A threat is a manifestation of the defendant's state of mind as it relates to the issue of premeditation and is therefore an exception to the hearsay rule under *W.Va.R.Evid.* 803(3).

Syl. pt. 7 - In order to qualify as an excited utterance under *W.Va.R.Evid.* 803(2), the declarant must (1) have experienced a startling event or condition; (2) reacted while under the stress or excitement of that event and not from reflection and fabrication; and (3) the statement must relate to the startling event or condition.

Syl. pt. 8 - Within a *W.Va.R.Evid.* 803(2) analysis, to assist in answering whether the statement was made while under the stress or excitement of the event and not from reflection and fabrication, several factors must be considered, including (1) the lapse of time between the event and the declaration; (2) the age of the declarant; (3) the physical and mental state of the declarant; (4) the characteristics of the event; and (5) the subject matter of the statement.

The Court noted that *State v. Duell*, 175 W.Va. 233, 332 S.E.2d 246 (1985) served as guidance; nonetheless the *Rules of Evidence* are still paramount. Syllabus Point 1, *Reed v. Wimmer*, 195 W.Va. 199, 465 S.E.2d 199 (1995). Finding appellant's statement admissible as not hearsay, the Court also found the statement would have been admissible as a state of mind exception.

**EVIDENCE**

**Admissibility** (continued)

**Hearsay** (continued)

***State v. Sutphin***, (continued)

Since this statement was potentially hearsay within hearsay, the Court also found the victim's statement to her father an excited utterance given the duress suffered and the proximity in time of the statement to the duress. See *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987) for factors determining excited utterance; despite analysis under the former spontaneous declaration rule, the Court found these factors still valid. *State v. Young*, 166 W.Va. 309, 273 S.E.2d 592 (1980); *State v. Murray*, 180 W.Va. 41, 375 S.E.2d 405 (1988). The three-part analysis here is more concise.

(**NOTE**: The Court disclaimed the hearsay within hearsay analysis in that the original statement was not hearsay; nonetheless the analysis is extensive and instructive). No error.

**Hearsay within hearsay**

***State v. Sutphin***, 466 S.E.2d 402 (1995) (Recht, J.)

See EVIDENCE Admissibility, Hearsay, (p. 235) for discussion of topic.

**Hypnotized witnesses' testimony**

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See WITNESSES Hypnotized, Use of testimony following, (p. 712) for discussion of topic.

**EVIDENCE**

**Admissibility** (continued)

**Identification in court**

***State v. Day***, 447 S.E.2d 576 (1994) (Per Curiam)

See IDENTIFICATION In court, Admissibility, (p. 346) for discussion of topic.

***State v. Franklin***, 448 S.E.2d 158 (1994) (Per Curiam)

See IDENTIFICATION In court, Admissibility, (p. 347) for discussion of topic.

**Immunized witness' testimony**

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

Appellant was convicted of murder. He sought a *Kastigar* hearing to require the prosecution to show that its evidence was obtained exclusive of appellant's own statements. Appellant was given immunity on February 3, 1983 in return for his cooperation in the investigation. The trial court refused the request.

Appellant's statements upon his arrest were read to the grand jury (both the special prosecuting attorney and the lead investigator were unaware of the immunity). The state claimed the conviction was obtained solely through two other witnesses' statements.

Syl. pt. 6 - When a previously immunized witness is prosecuted, a hearing must be held pursuant to *Kastigar v. United States*, 406 U.S. 441 (1972), for the purpose of requiring the State to demonstrate by a preponderance that all of the evidence it proposes to use was derived from legitimate sources wholly independent of the immunized testimony.

## EVIDENCE

**Admissibility** (continued)

**Immunized witness' testimony** (continued)

***State v. Beard***, (continued)

The Court found the state's representations insufficient. Investigatory leads obtained from statements by immunized witnesses are also subject to a *Kastigar* hearing. The Court noted that such a hearing could be held either pre-trial, mid-trial or post-trial. Remanded for hearing.

**Late-discovered evidence**

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See DISCOVERY Failure to disclose, Late-discovered evidence, (p. 176) for discussion of topic.

**Lay persons' opinion on issue of sanity**

***State v. Walls***, 445 S.E.2d 515 (1994) (Per Curiam)

See INSANITY Presumptions, (p. 377) for discussion of topic.

**Marital communications**

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

Appellant was convicted of first-degree murder and aggravated robbery. He claimed that his arrest and subsequent confession should have been inadmissible as stemming from communications between his wife and himself.

**EVIDENCE**

**Admissibility** (continued)

**Marital communications** (continued)

***State v. Bradshaw***, (continued)

Syl. pt. 9 - West Virginia recognizes two marital privileges: the spousal testimony privilege and the marital confidence privilege. The two are distinct and must be analyzed separately. The spousal testimony privilege is much broader than the marital confidence privilege in that it bars all adverse testimony; whereas, the marital confidence privilege applies only to confidential communications and can be asserted even after the dissolution of the marriage. On the other hand, the spousal testimony privilege is narrower than the marital confidence privilege in that it applies only to criminal proceedings and can be asserted only during the marriage.

Syl. pt. 10 - The marital confidence privilege applies only to communications that are confidential. Communications made in the presence of known third parties or intended to be disclosed to disclosed to others are outside the privilege.

Syl. pt. 11 - *W.Va. Code*, 57-3-3 (1923), absolutely prohibits the spouse of a criminal defendant from testifying against the defendant, except where the defendant is charged with a crime against the person or property of the other spouse or certain other relatives. Where properly invoked, this statute precludes all adverse testimony by a spouse, not merely disclosure of confidential communications. This spousal protection applies only to legally recognized marriages and lasts only as long as the legal marriage exists.

Syl. pt. 12 - "An objection to an adverse ruling on a motion in limine to bar evidence at trial will preserve the point, even though no objection was made at the time the evidence was offered, unless there has been a significant change in the basis for admitting the evidence." Syllabus Point 1, *Wimer v. Hinkle*, 180 W.Va. 660, 379 S.E.2d 383 (1989).

Syl. pt. 13 - In the realm of nonconstitutional error, the appropriate test for harmlessness is whether we can say with fair assurance, after stripping the erroneous evidence from the whole, that the remaining evidence independently was sufficient to support the verdict and that the judgment was not substantially swayed by the error.

***State v. Bradshaw***, (continued)

The Court noted that a spouse may not be called to testify but that if a spouse does testify, reversible error does not necessarily occur. Here, appellant's wife's testimony related to general comments about their family, from which airport her husband left, what he was wearing and his purported travel plans.

The trial court ruled appellant's wife could testify to anything that could be observed by others. The Court agreed, holding the testimony did not fall within the marital privilege, both because of the content and because there was no expectation of confidentiality.

As to spousal immunity, appellant and his wife were divorced when he was tried a second time; clearly the statute did not apply. Even as to the first trial (occurring during the marriage) the Court found harmless error. See *W.Va. Code*, 57-3-3 and 4; *State v. Robinson*, 180 W.Va. 400, 376 S.E.2d 606 (1988); *State v. Jarrell*, 191 W.Va. 1, 5, 442 S.E.2d 223, 227 (1994).

Further, appellant's wife's extrajudicial comments were insufficient to justify exclusion of evidence under a "fruits of the poisonous tree" doctrine. Police were under no compulsion to warn her of the spousal privilege. *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Statements made to police are clearly not protected by marital privilege. *State v. Bailey*, 179 W.Va. 1, 365 S.E.2d 46 (1987). No error.

***State v. Malick***, 457 S.E.2d 482 (1995) (Per Curiam)

See IMMUNITY Spousal testimony, (p. 350) for discussion of topic.

**EVIDENCE**

**Admissibility** (continued)

**Marital privilege**

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Marital communications, (p. 239) for discussion of topic.

**Missing evidence**

***State v. Osakalumi***, 461 S.E.2d 504 (1995) (McHugh, C.J.)

See EVIDENCE Missing or unavailable, (p. 281) for discussion of topic.

**Motor vehicle check points**

***State v. Davis***, 464 S.E.2d 598 (1995) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Sobriety check points, (p. 191) for discussion of topic.

**Opinion of lay witnesses**

***State v. Jameson***, 461 S.E.2d 67 (1995) (Per Curiam)

See EVIDENCE Opinion of lay witness, Sufficient foundation for, (p. 284) for discussion of topic.

**Opinion of witness' character**

***State v. Wood***, 460 S.E.2d 771 (1995) (McHugh, C.J.)

See EVIDENCE Witnesses, Reputation for truthfulness, (p. 292) for discussion of topic.

**EVIDENCE**

**Admissibility** (continued)

**Photographs**

***State v. Derr***, 451 S.E.2d 731 (1994) (Cleckley, J.)

Appellant was convicted of first-degree murder, malicious assault and first-degree sexual assault. At trial pictures were introduced of the deceased young girl "as she was found at the scene of the crime." Appellant contends these pictures were "gruesome photographs" and were inadmissible under Rules 401, 402 and 402 of the *Rules of Evidence* and *State v. Rowe*, 163 W.Va. 593, 259 S.E.2d 26 (1979).

At a pre-trial suppression hearing defense counsel argued the facts at issue could be established by the autopsy report. The prosecuting attorney asked the court to find the pictures were not gruesome and that no balancing test was necessary; in the alternative that their probative value outweighed any prejudice. Both photographs were found not gruesome, relevant and admissible.

Syl. pt. 6 - Whatever the wisdom and utility of *State v. Rowe*, 163 W.Va. 593, 259 S.E.2d 26 (1979), and its progeny, it is clear that the *Rowe* balancing test did not survive the adoption of the *West Virginia Rules of Evidence*. Therefore, *State v. Rowe*, *supra*, is expressly overruled because it is manifestly incompatible with Rule 403 of the *West Virginia Rules of Evidence*.

Syl. pt. 7 - The *West Virginia Rules of Evidence* remain the paramount authority in determining the admissibility of evidence in circuit courts. These rules constitute more that a mere refinement of common law evidentiary rules, they are a comprehensive reformulation of them.

Syl. pt. 8 - The admissibility of photographs over a gruesome objection must be determined on a case-by-case basis pursuant to Rules 401 through 403 of the *West Virginia Rules of Evidence*.

**EVIDENCE**

**Admissibility** (continued)

**Photographs** (continued)

***State v. Derr***, (continued)

Syl. pt. 9 - Although Rules 401 and 402 of the *West Virginia Rules of Evidence* strongly encourage the admission of as much evidence as possible, Rule 403 of the *West Virginia Rules of Evidence* restricts this liberal policy by requiring a balancing of interests to determine whether logically relevant is legally relevant evidence. Specifically, Rule 403 provides that although relevant, evidence may nevertheless be excluded when the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence.

Syl. pt. 10 - Rule 401 of the *West Virginia Rules of Evidence* requires the trial court to determine the relevancy of the exhibit on the basis of whether the photograph is probative as to a fact of consequence in the case. The trial court then must consider whether the probative value of the exhibit is substantially outweighed by the counterfactors listed in Rule 403 of the *West Virginia Rules of Evidence*. As to the balancing under Rule 403, the trial court enjoys broad discretion. The Rule 403 balancing test is essentially a matter of trial conduct, and the trial court's discretion will not be overturned absent a showing of clear abuse.

The Court found the pictures here to be of slight relevance but not "unfairly prejudicial." No abuse of discretion.

**Physician/patient privilege**

***State ex rel. Allen v. Bedell***, 454 S.E.2d 77 (1994) (Workman, J.)

See DRIVING UNDER THE INFLUENCE Blood alcohol tests, (p. 187) for discussion of topic.

**EVIDENCE**

**Admissibility** (continued)

**Polygraph tests**

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See EVIDENCE Polygraph tests, (p. 285) for discussion of topic.

***State v. Chambers***, 459 S.E.2d 112 (1995) (Neely, J.)

See EVIDENCE Polygraph tests, Reference to inadmissible, (p. 286) for discussion of topic.

**Preliminary hearing not stage to challenge**

***State ex rel. Brown v. Dietrick***, 444 S.E.2d 47 (1994) (Miller, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 579) for discussion of topic.

**Psychological/psychiatric examinations**

***State v. Roy***, 460 S.E.2d 277 (1995) (Cleckley, J.)

Appellant was convicted of third degree sexual assault (statutory rape). Although apparently a willing participant, the victim was later counseled regarding her stepfather and mother's separation. During conversations with her counselor the two incidents of sexual intercourse were discussed. Appellant claimed the entire counseling file should have been discoverable under Rule 16 of the *West Virginia Rules of Criminal Procedure*.

Syl. pt. 1 - Rule 16(a)(1)(D) of the *West Virginia Rules of Criminal Procedure* allows discovery of all results or reports of physical or mental examinations which are material to the defense or are to be used as evidence in the prosecution's case-in-chief.

**EVIDENCE**

**Admissibility** (continued)

**Psychological/psychiatric examinations** (continued)

***State v. Roy***, (continued)

Syl. pt. 2 - The public policy consideration which underlies the statutes preventing disclosure of confidential information held by counselors, social workers, psychologists, and/or psychiatrists is to enhance communications and effective treatment and diagnosis by protecting the patient/client from the embarrassment and humiliation that might be caused by the disclosure of information imparted during the course of consultation. Considering the existence and strength of these protections established by the Legislature, the only issue left for a trial court is whether a criminal defendant is entitled to judicial inspection of confidentially protected communications *in camera* and thereafter to their release if the inspection indicated their relevancy.

Syl. pt. 3 - Before any *in camera* inspection of statutorily protected communications can be justified, a defendant must show both relevancy and a legitimate need for access to the communications. This preliminary showing is not met by bald and unilluminating allegations that the protected communications *could* be relevant or that the very circumstances of the communications indicate they are *likely* to be relevant or material to the case. Similarly, an assertion that inspection of the communications is needed only for a possible attack on credibility is also rejected. On the other hand, if a defendant can establish by credible evidence that the protected communications are likely to be useful to his defense, the trial judge should review the communications *in camera*.

The Court noted the victim's test results were given to appellant; further, the trial court reviewed the file and found the contents either irrelevant or inadmissible. The Court also noted the counseling related to the victim's parents' divorce, not to the crime.

The Court distinguished *State v. Allman*, 177 W.Va. 365, 352 S.E.2d 116 (1986) in that the examination file contained exculpatory evidence. See also, *W.Va. Code*, 27-3-1; 30-30-12 and 30-31-13, all relating to privileged communication with a counselor. The defendant has the burden of demonstrating even the need for an *in camera* inspection. No abuse of discretion here.

**Admissibility** (continued)

**Race prejudice**

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 544) for discussion of topic.

**Rebuttal**

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 544) for discussion of topic.

**Reenactment of crime**

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

Appellant was convicted of first-degree murder and aggravated robbery. During cross-examination he was required to reenact the killings.

Syl. 14 - The admission of demonstrative evidence rests largely within the trial court's discretion, and an appellate court will not interfere unless the trial court has abused that discretion. More specifically, demonstrative evidence in the nature of witness reenactment is admissible if it affords a reasonable inference on a point in issue.

The Court noted the entire case turned on self-defense. The Court found appellant voluntarily subjected himself to the possibility of reenactment. *State v. Clark*, 175 W.Va. 58, 63, 331 S.E.2d 496, 501 (1985). See also, *State v. Thornton*, 498 N.W.2d 670 (Iowa 1993).

**Admissibility** (continued)

**Reenactment of crime** (continued)

***State v. Bradshaw***, (continued)

The Court also rejected appellant's claim that the reenactment was misleading and should have been excluded under Rule 403 of the *Rules of Evidence*. Noting that appellant failed to make specific objection or reference to Rule 403, as required by Rule 103(a)(1), the Court found it must give the trial court's finding substantial weight. Because there was evidence of record as to the mode of the reenactment, even though the reenactment varied from appellant's version of the events, no error.

**Refusal to take polygraph test**

***State v. Chambers***, 459 S.E.2d 112 (1995) (Neely, J.)

See EVIDENCE Polygraph tests, Reference to inadmissible, (p. 286) for discussion of topic.

**Religious prejudice or beliefs**

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 544) for discussion of topic.

**EVIDENCE**

**Admissibility** (continued)

**Reputation of accused**

***State v. Roy***, 460 S.E.2d 277 (1995) (Cleckley, J.)

Appellant was convicted of third degree sexual assault. At trial, the prosecution called as a witness appellant's cousin, a State Trooper, who said "any time he gets in trouble he will lie to get out of it." Appellant objected to the Trooper's testifying in uniform; his reputation testimony was based partly upon the alleged acts; he was not disclosed as a prosecution witness; and appellant did not place his reputation for truthfulness at issue.

Syl. Pt. 4 - The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to certain limitations. The evidence may refer only to character for truthfulness or untruthfulness. A fair reading of Rule 608(a) of the *West Virginia Rules of Evidence* provides that a witness may be impeached by proof that the witness is untruthful. Under this rule, no distinction is made between nonparty witnesses and party witnesses. The rule applies with equal force to the defendant in a criminal case. The form of proof may be either "reputation"' or "opinion" evidence.

Syl. pt. 5 - Unlike Rule 404(a)(1) of the *West Virginia Rules of Evidence*, a witness's character for truthfulness is placed in issue once the witness testifies. No more is required. The accused, by testifying, becomes subject to an attack on his credibility. In this regard, he is treated like any other witness; therefore, his credibility is placed in issue even though he should offer no direct testimony concerning his *good* reputation for truthfulness or concerning a character trait otherwise at issue.

Here, appellant did testify, placing his reputation at issue. See Cleckley, *Handbook on Evidence for West Virginia Lawyers*, 6-8(A)(4) at 688 (3d ed. 1994). Further, appellant did not ask for continuance due to surprise for failure of the prosecution to disclose the witness. No error. Affirmed.

**EVIDENCE**

**Admissibility** (continued)

**Scientific evidence**

***Gentry v. Mangum***, 466 S.E.2d 171 (1995) (Cleckley, J.)

(**NOTE**: While this case involves a civil action for damages, it is included because of its relevance to scientific evidence in criminal cases.)

Appellant was a deputy sheriff in Raleigh County. He was shot when he stopped to investigate a traffic accident. Before he could reach the shotgun stored in the trunk of the police cruiser, he was shot again. He claimed that Sheriff Mangum knowingly promulgated and enforced a regulation concerning storing the shotgun in the locked trunk without studying the hazards associated therewith or training sheriff's deputies in retrieval of the shotgun.

Pretrial discovery showed several deputies had disputed the policy and appellant had discussed with the Sheriff their dissatisfaction. Despite these discussions, no training was given in retrieval of the shotguns. The action was sought as a "*Mandolidis*" action involving deliberate intent to harm.

At trial appellant attempted to introduce testimony from a police officer who claimed that Sheriff Mangum's failure to give training resulted in an unsafe working environment with a high probability of harm; he further testified that the Sheriff realized the danger and that these conditions were a direct and proximate cause of appellant's injuries. The circuit court refused to admit the testimony and held the officer had no special expertise in the subject matter; that the Sheriff had not violated any standards and that failure to train was not a proximate cause of appellant's injuries. It granted defendants' summary judgment motion.

Appellant argued here that expert testimony was of two types; the first involves application of the scientific method while the second relates solely to experience and training. The refused testimony was of the second type and therefore admissible.

Syl. pt. 1 - An interpretation of the *West Virginia Rules of Evidence* presents a question of law subject to *de novo* review.

**EVIDENCE**

**Admissibility** (continued)

**Scientific evidence** (continued)

***Gentry v. Mangum***, (continued)

Syl. pt. 2 - Summary judgment is proper only if, in the context of the motion and any opposition to it, no genuine issue of material fact exists and the movant demonstrates entitlement to judgment as a matter of law. A party seeking summary judgment must make a preliminary showing that no genuine issue of material fact exists. Once the movant makes this showing, the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trial worthy issue. An expert's deposition or affidavit that is conclusory only is not sufficient to meet the burden on the party opposing the motion, although an affidavit or deposition containing an adequately supported opinion may suffice to raise a genuine issue of fact. An issue is "genuine" when the evidence relevant to it, viewed in the light most favorable to the party opposing the motion, is sufficiently open ended to permit a rational factfinder to resolve the issue in favor of either side.

Syl. pt. 3 - The first and universal requirement for the admissibility of scientific evidence is that the evidence must be both "reliable" and "relevant." Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, U.S., 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993), *cert denied*, U.S., 114 S.Ct. 2137, 128 L.Ed.2d 867 (1994), the reliability requirement is met only by a finding by the trial court under Rule 104(a) of the *West Virginia Rules of Evidence* that the *scientific* or technical theory which is the basis for the test results is indeed "scientific, technical, or specialized knowledge." The trial court's determination regarding whether the scientific evidence is properly the subject of scientific, technical, or other specialized knowledge is a question of law that we review *de novo*. On the other hand, the relevancy requirement compels the trial judge to determine, under Rule 104(a), that the scientific evidence "will assist the trier of fact to understand the evidence or to determine a fact in issue." *W.Va.R.Evid.* 702. Appellate review of the trial court's rulings under the relevancy requirement are reviewed under an abuse of discretion standard. *State v. Beard*, 194 W.Va. 740, 461 S.E.2d 486, 492 (1995).

***Gentry v. Mangum***, (continued)

Syl. pt. 4 - When scientific evidence is proffered, a circuit court in its "gatekeeper" role under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, U.S., 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993), *cert denied*, U.S., 114 S.Ct. 2137, 128 L.Ed.2d 867 (1994), must engage in a two-part analysis in regard to the expert testimony. First, the circuit court must determine whether the expert testimony reflects scientific knowledge, whether the findings are derived by scientific method, and whether the work product amounts to good science. Second, the circuit court must ensure that the scientific testimony is relevant to the task at hand.

Syl. pt. 5 - In determining who is an expert, a circuit court should conduct a two-step inquiry. First, a circuit court must determine whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) which will assist the trier of fact. Second, a circuit court must determine that the expert's area of expertise covers the particular opinion as to which the expert seeks to testify.

Syl. pt. 6 - The question of admissibility under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, U.S., 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993), *cert denied*, U.S., 114 S.Ct. 2137, 128 L.Ed.2d 867 (1994) only arises if it is first established that the testimony deals with "scientific knowledge." "Scientific" implies a grounding in the methods and procedures of science while "knowledge" connotes more than subjective belief or unsupported speculation. In order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. It is the circuit court's responsibility initially to determine whether the expert's proposed testimony amounts to "scientific knowledge" and, in doing so, to analyze not what the experts say, but what basis they have for saying it.

**EVIDENCE**

**Admissibility** (continued)

**Scientific evidence** (continued)

***Gentry v. Mangum***, (continued)

The Court noted that Rule 702 is not limited to scientific evidence; it refers to expert testimony generally. On remand, the trial court can still exclude the evidence here based on Rules 403 or 703. Circuit courts should require (1) the identity of all expert witnesses; (2) provide experts' written reports and the basis for their opinions; and (3) that the experts be available for deposition. The issue is not whether the evidence offered is correct but whether the science underlying it is valid.

Noting the trial court has discretion in this area, the Court nonetheless held that the police officer was an expert for purposes of Rule 702. Unless otherwise inadmissible under Rules 702, 703 and 403, his testimony should have been admissible. The Court noted that *Daubert* commented that cross-examination, instructions on the burden of proof and rebuttal evidence are more effective at arriving at truth than exclusion of testimony. *Daubert*, 113 S.Ct. at 2798, 125 L.Ed.2d at 484. Reversed and remanded.

**Spontaneous declarations/excited utterance**

***State v. Hopkins***, 453 S.E.2d 317 (1994) (Neely, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 602) for discussion of topic.

**Spousal immunity**

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Marital communications, (p. 239) for discussion of topic.

**EVIDENCE**

**Admissibility** (continued)

**Spousal immunity** (continued)

***State v. Malick***, 457 S.E.2d 482 (1995) (Per Curiam)

See IMMUNITY Spousal testimony, (p. 350) for discussion of topic.

**Spousal testimony**

***State v. Jarrell***, 442 S.E.2d 223 (1994) (Brotherton, J.)

See IMMUNITY Spousal testimony, (p. 349) for discussion of topic.

**Standard for (generally)**

***State v. Stuart***, 452 S.E.2d 886 (1994) (Cleckley, J.)

See SEARCH AND SEIZURE Warrantless search, Probable cause to stop for, (p. 590) for discussion of topic.

**Suicide note**

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See EVIDENCE Admissibility, Dying declaration, (p. 222) for discussion of topic.

**Tape recorded statements to informant**

***State v. Dillon***, 447 S.E.2d 583 (1994) (Workman, J.)

See EVIDENCE Admissibility, Tape recorded statements to informant, (p. 255, 256, 257, 258, 259) for discussion of topic.

**EVIDENCE**

**Admissibility** (continued)

**Tape recorded statements to informant** (continued)

***State v. Dillon***, 447 S.E.2d 583 (1994) (Workman, J.)

Appellant was convicted of delivery of marijuana. Appellant was a cab driver for a company generally under investigation for distribution of controlled substances. The police sought undercover informants, one of whom identified appellant as a dealer. The informant agreed to wear a recording device.

While the informant was in appellant's cab, a conversation was recorded wherein appellant confirmed terms of a sale of marijuana previously offered to the informant (which terms had been related to police previously). Acting upon the information received, police followed appellant to an apartment complex and then to the location of the exchange. Because no marijuana was exchanged, no arrest was made. Later, however, appellant was observed passing an item to the informant, which item was later identified as marijuana.

A second exchange of marijuana took place subsequently and the arrangements were recorded over a telephone. Another recording was made in appellant's cab following the telephone arrangements but although money was given to appellant no marijuana changed hands. After a trip to the same apartment complex involved in the first buy, appellant returned and another recording was made in the cab wherein appellant told the informant he was going to get the marijuana. Appellant then took the informant to the apartment complex where another conversation was recorded. Appellant entered the complex and then drove the informant back to the target area; after going to a local bar, appellant returned and the informant entered the cab. Following this meeting informant gave police more marijuana.

**EVIDENCE**

**Admissibility** (continued)

**Tape recorded statements to informant** (continued)

***State v. Dillon***, 447 S.E.2d 583 (1994) (Workman, J.)

At trial, appellant relied on entrapment. A fellow cab driver testified that the informant told him she would retaliate against appellant for his refusal to let her charge rides. Police testified that appellant was approached to make drug buys, that he was read *Miranda* rights at that time, waived those rights and admitted to buying drugs for the informant. Appellant claimed the informant asked him ten or eleven times for drugs and that he was never given his *Miranda* rights when questioned. He denied admitting to selling drugs and claimed he agreed to procure drugs for informant only after she threatened to tell his wife he had sex with her. Appellant's statement to police was admitted to evidence.

Appellant's counsel made a tape of the informant wherein she admitted to asking appellant ten or eleven times for marijuana, only to be turned down; that she had no knowledge of his predisposition to deliver drugs; and that appellant received no funds for the delivery. The trial court ruled the tape inadmissible hearsay. Informant, although subpoenaed, did not appear, necessitating introduction of the police tapes, which were admitted to evidence. Appellant claimed informant's absence makes proof of her consent to record impossible (allegedly necessary pursuant to *W.Va. Code*, 62-1D-3(c)(2).

To rebut appellant's entrapment claims, a tape of appellant and the informant was admitted to evidence wherein they discussed a possible cocaine transaction. The tape was allowed for the limited purpose of showing predisposition to sell drugs.

Syl. pt. 1 - Proof of consent for purposes of electronic intercept set forth in West Virginia Code §§ 62-1D-3 (1992) and 62-1D-6 (1992) need not be proven solely by the consenting individual's testimony, but can be proven through other evidence, such as the testimony of the person to whom the consent was given, that the consenting individual actually consented to the electronic intercept.

**EVIDENCE**

**Admissibility** (continued)

**Tape recorded statements to informant** (continued)

***State v. Dillon***, 447 S.E.2d 583 (1994) (Workman, J.)

Syl. pt. 2 - "Generally, out-of-court statements made by someone other than the declarant while testifying are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action; 2) the statement is not hearsay under the rules; or 3) the statement is hearsay but falls within an exception provided for in the rules." Syl. Pt. 1, *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990).

Syl. pt. 3 - " 'The language of Rule 804(b)(5) of the *West Virginia Rules of Evidence* and its counterpart in Rule 803(24) requires that five general factors must be met in order for hearsay evidence to be admissible under the rules. First and most important is the trustworthiness of the statement, which must be equivalent to the trustworthiness underlying the specific exceptions to the hearsay rule. Second, the statement must be offered to prove a material fact, Third, the statement must be shown to be more probative on the issue for which it is offered than any other evidence the proponent can reasonably procure. Fourth, the statement must comport with the general purpose of the rules of evidence and the interest of justice. Fifth, adequate notice of the statement must be afforded the other party to provide that party a fair opportunity to meet the evidence.' Syl. pt. 5, *State v. Smith*, 178 W.Va. 104, 358 S.E.2d 188 (1987)." Syl. Pt. 1, *State v. Bailey*, 179 W.Va. 1, 365 S.E.2d 46 (1987).

Syl. pt. 4 - "The two central requirements for admission of extra judicial testimony under the Confrontation Clause contained in the Sixth Amendment to the *United States Constitution* are: (1) demonstrating the unavailability of the witness to testify; and (2) proving the reliability of the witness's out-of-court statement." Syl. Pt. 2, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

**EVIDENCE**

**Admissibility** (continued)

**Tape recorded statements to informant** (continued)

***State v. Dillon***, 447 S.E.2d 583 (1994) (Workman, J.)

Syl. pt. 5 - "In order to satisfy its burden of showing that the witness is unavailable, the State must prove that it has made a good-faith effort to obtain the witness's attendance at trial. This showing necessarily requires substantial diligence." Syl. Pt. 3, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

Syl. pt. 6 - "Under the requirements of the Confrontation Clause contained in the Sixth Amendment to the *United States Constitution*, evidence offered under the residual hearsay exceptions contained in Rule 803(24) and Rule 804(b)(5) of the *West Virginia Rules of Evidence* is presumptively unreliable because it does not fall within any firmly rooted hearsay exception, and, therefore, such evidence is not admissible. If, however, the State can make a specific showing of particularized guarantees of trustworthiness, the statements may be admissible. In this regard, corroborating evidence may not be considered, and it must be found that the declarant's trustfulness is so clear that cross-examination would be of marginal utility." Syl. Pt. 6, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

As to consent to tape, one of the police officers testified that the informant agreed. The Court found that testimony sufficient.

Noting that appellant's own statements were admissible because they were not hearsay (*West Virginia Rules of Evidence* 801(d)(2)(A), the Court ruled the informant's statements admissible because they were not hearsay either, not being offered for the truth of the matters asserted but rather to place appellant's statements in context. *State v. Burd*, 187 W.Va. 415, 419 S.E.2d 676 (1991), interpreting Rule 801(c).

Similarly, the State showed the requisite due diligence in trying to procure the informant's presence. Additionally, testimony by the investigating officers established informant's reliability in that they observed much of the transactions at issue and identified the voices on the tapes. No violation of appellant's Sixth Amendment right to confront. *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990); *State v. Phillips*, 187 W.Va. 205, 417 S.E.2d 124 (1992).

**EVIDENCE**

**Admissibility** (continued)

**Tape recorded statements to informant** (continued)

***State v. Dillon***, 447 S.E.2d 583 (1994) (Workman, J.)

The tape recording of the informant's interview with appellant's counsel, offered to support entrapment and to show other possible perpetrators, was offered to show the truth of the matters asserted. Therefore, the only exception to hearsay possible was the residual exception in Rule 801(c). In light of the problems with trustworthiness (only the informant and appellant's counsel could testify, unlike the police availability on the other tapes), the tape was inadmissible. *State v. Garrett*, 182 W.Va. 166, 386 S.E.2d 823 (1989). No error.

Finally, the tape recording of the telephone conversation regarding a possible cocaine buy was properly admitted since the trial court gave a limiting instruction concerning the tape's purpose to rebut appellant's claim of entrapment. *W.Va.R.Evid*. 404(b). Further, under Rules 402 and 403, the Court found the trial court did not abuse its discretion in ruling that the probative value outweighed any prejudice. No error.

The Court summarily disposed of various other errors raised (see full opinion). Affirmed.

**Tape recorded statements to police**

***State v. Jarrell***, 442 S.E.2d 223 (1994) (Brotherton, J.)

Appellant was convicted of first-degree murder. At trial tape-recorded conversations between a co-defendant and police were allowed into evidence. Appellant claimed because the tapes were made after the killing that they are not admissible as statements made "during the course and in furtherance of the conspiracy." *W.Va.R.Evid*. 801(d)(2)(E).

The Court found the recordings inadmissible. The statements were not made in furtherance of a conspiracy, nor were they introduced for impeachment purposes. (Reversed and remanded on other grounds.)

**EVIDENCE**

**Admissibility** (continued)

**Tape recordings**

***DHHR ex rel. Wright v. David L.***, 453 S.E.2d 646 (1994) (Cleckley, J.)

This case involved certified questions arising in a divorce action in which the father became concerned that the mother was abusing their children. The father asked his mother to put a voice-activated tape recorder in the children's bedroom. A series of tape recordings were made without the mother's knowledge or consent.

The father gave the tapes to his lawyer who relayed them to the prosecuting attorney; a counselor and a DHHR worker listened to some of the tapes, resulting in an abuse and neglect petition being filed 29 April 1994. By order of the same day, DHHR was granted temporary legal and physical custody, with DHHR authorized to give the father physical custody.

Following a hearing during which the tapes were played for all parties (the judge did not listen to them but ordered them sealed), and the mother agreed to the temporary order, she filed motion to vacate the order, challenging the admissibility of the tapes and alleging that insufficient evidence existed to support the order. The circuit court ruled the tapes inadmissible under *W.Va. Code*, 62-1D-3(a)(1), and its federal equivalent, 18 U.S.C. 2511(a)(a), and certified the question.

Syl. pt. 1 - "One spouse's interception of telephone communications by the other is a violation of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510, *et seq.*, which by its terms renders them inadmissible." Syllabus Point 15, *Marano v. Holland*, 179 W.Va. 156, 366 S.E.2d 117 (1988).

Syl. pt. 2 - " 'Courts always endeavor to give effect to the legislative intent, but a statute that is clear and unambiguous will be applied and not construed.' Syllabus Point 1, *State v. Elder*, 152 W.Va. 571, 165 S.E.2d 108 (1968)." Syllabus Point 1 of *State v. Boatright*, 184 W.Va. 27, 399 S.E.2d 57 (1990).

Syl. pt. 3 - Any recordings of conversations made in violation of *W.Va. Code*, 62-1D-3(a)(1) (1987), and 18 U.S.C. § 2511(1)(a) (1988) are inadmissible under *W.Va. Code*, 62-1D-6 (1987), and 18 U.S.C. § 2515 (1968).

**EVIDENCE**

**Admissibility** (continued)

**Tape recordings** (continued)

***DHHR ex rel. Wright v. David L.***, (continued)

Syl. pt. 4 - A parent has no right on behalf of his or her children to give consent under *W.Va. Code*, 62-1D-3(c)(2) (1987), or 18 U.S.C. § 2511(2)(d) (1988) to have the children's conversations with the other parent recorded while the children are in the other parent's house.

Syl. pt. 5 - "In domestic cases involving allegations of abuse and neglect, a circuit court or family law master may order that a home study be performed to investigate the allegations under Rule 34 (b) of the Rules of Practice and Procedure for Family Law." Syllabus Point 5, *John D.K. v. Polly A.S.*, 190 W.Va. 254, 438 S.E.2d 46 (1993).

The Court found the facts here significantly different from *Marano*, *supra*, but sufficiently similar to bar admission of the tapes. No statutory exception covers the facts here. The mother had reasonable expectation that her conversations were private.

Further, the father could not consent to the recording on behalf of the children (whose conversations were also recorded) because the children were in the mother's physical custody and the conversations were recorded in the mother's house, over which the father had no dominion whatsoever.

However, the Court noted under the proper circumstances authorization by a neutral judicial officer could result in permissible wiretapping or recording by one spouse of the other's conversations. Out of concern for the children the Court ordered the circuit court to order DHHR to conduct home studies of both parents.

**EVIDENCE**

**Admissibility** (continued)

**Testimony of unavailable witness**

***State v. Woods***, 460 S.E.2d 65 (1995) (Per Curiam)

Appellant was convicted of aggravated robbery of a convenience store. Immediately following the robbery three bystanders gave chase and were able to identify the get-away car by make and license plate number. Upon arrest, appellant was found with a loaded shotgun and a plastic bag from the convenience store. He was lying on $181.00 in bills and a substantial amount of change.

Appellant claimed he was in a bar at the time of the robbery, had been drinking and walked to the vehicle wherein he was apprehended, passing out in the back seat. The convenience store clerk identified appellant although the owner of a tavern claimed appellant was in the tavern until after the time of the robbery.

Appellant's first trial ended in a mistrial; during that first trial two of the three bystanders who gave chase testified as to the get-away car's make and license plate number. They were unavailable for the retrial (from which this appeal was taken). The court admitted the testimony, finding under Rule 804 of the *Rules of Evidence* that the prosecution made a reasonable effort to secure their presence.

Syl. pt. 1 - "As a condition precedent to the admissibility of former testimony under *W.Va.R.Evid*. 804(b)(1), the proponent of such testimony must show the unavailability of the witness. If the witness is available, the in-court testimony of that witness if preferred." Syl. pt. 3, *Rine v. Irisari*,187 W.Va. 550, 420 S.E.2d 541 (1992).

Syl. pt. 2 - "In order to satisfy its burden of showing that the witness is unavailable, the State must prove that is has made a good-faith effort to obtain the witness's attendance at trial. This showing necessarily requires substantial diligence." Syl. pt. 3, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

**EVIDENCE**

**Admissibility** (continued)

**Testimony of unavailable witness** (continued)

***State v. Woods***, (continued)

The Court found sufficient showing that the prosecution attempted to obtain the witnesses here; police searched in two counties, including one witness' mother's and sister's residences and last place of employment. The Court noted the second trial involved the same circumstances, the same attorneys and that cross-examination was afforded at the earlier trial. No error.

**Threats by defendant**

***State v. Sutphin***, 466 S.E.2d 402 (1995) (Recht, J.)

See EVIDENCE Admissibility, Hearsay, (p. 235) for discussion of topic.

**Transcripts of audio or video tapes**

***State v. Hardesty***, 461 S.E.2d 478 (1995) (Fox, J.)

Appellant was convicted of several counts of possession with intent to deliver, delivery and conspiracy to deliver controlled substances. Transcripts of the audio recordings of the drug sales to an informant were admitted into evidence. Appellant claimed unfair surprise and error in that the transcripts were not the best evidence. Rule 1002, *W.Va. Rules of Evidence*. Appellant's trial counsel did not receive transcripts of the tapes until 1 April 1994; trial began 5 April 1994.

The jury was furnished with the transcripts each time a recording was played. Pursuant to defense counsel's objections, the court read a cautionary instruction each time. The transcripts were apparently not taken to the jury room during deliberations.

**EVIDENCE**

**Admissibility** (continued)

**Transcripts of audio or video tapes** (continued)

***State v. Hardesty***, (continued)

Syl. pt. 3 - Audio and video tape recording transcripts provided to a jury as an aid while the actual tapes are being seen or heard are not themselves evidence, should not be admitted into evidence, and should not be furnished to the jury during deliberations. Audio and video tape recording transcripts are demonstrative aids for the understanding of evidence; they should be so marked and identified; and the court should instruct the jury regarding the purpose and limited use of the transcripts.

The Court noted that although the transcripts were admitted into evidence they were used only as aids to listening to the tapes themselves. Further, no harm was specified from the lateness of the transcript's delivery to defense counsel; no preservation of the error was attempted by motion for continuance. No error.

**Unavailable witness' statements**

***State v. Dillon***, 447 S.E.2d 583 (1994) (Workman, J.)

See EVIDENCE Admissibility, Tape recorded statements to informant, (p. 255, 256, 257, 258, 259) for discussion of topic.

**Victim's psychological/psychiatric records**

***State v. Roy***, 460 S.E.2d 277 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Psychological/psychiatric, (p. 245) for discussion of topic.

**EVIDENCE**

**Admissibility** (continued)

**Warrantless search**

***State v. Buzzard***, 461 S.E.2d 50 (1995) Workman, J.)

See SEARCH AND SEIZURE Warrantless search, Consent to, (p. 584) for discussion of topic.

**Wiretaps**

***DHHR ex rel. Wright v. David L.***, 453 S.E.2d 646 (1994) (Cleckley, J.)

See EVIDENCE Admissibility, Tape recordings, (p. 260) for discussion of topic.

**Authentication of**

**Generally**

***State v. Jenkins***, 466 S.E.2d 471 (1995) (McHugh, C.J.)

See EVIDENCE Admissibility, Authentication of evidence, (p. 212) for discussion of topic.

**Blood alcohol test**

**Admissibility**

***State ex rel. Allen v. Bedell***, 454 S.E.2d 77 (1994) (Workman, J.)

See DRIVING UNDER THE INFLUENCE Blood alcohol tests, (p. 187) for discussion of topic.

## EVIDENCE

### Chain of custody

***State v. Day***, 447 S.E.2d 576 (1994) (Per Curiam)

See IDENTIFICATION In court, Admissibility, (p. 346) for discussion of topic.

### Character

#### Witness' reputation for truthfulness

***State v. Wood***, 460 S.E.2d 771 (1995) (McHugh, C.J.)

See EVIDENCE Witnesses, Reputation for truthfulness, (p. 292) for discussion of topic.

### Circumstantial

#### No need to exclude reasonable hypotheses

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See APPEAL Sufficiency of evidence, Generally, (p. 39) for discussion of topic.

#### Sufficiency of

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

Appellant was convicted of first-degree murder. He claimed that the jury verdict was contrary to the evidence, specifically, that the evidence was wholly circumstantial.

**EVIDENCE**

**Circumstantial** (continued)

**Sufficiency of** (continued)

***State v. Satterfield***, (continued)

Syl. pt. 14 - " ' "The weight of circumstantial evidence, as in the case of direct evidence, is a question for jury determination, and whether such evidence excludes, to a moral certainty, every reasonable hypothesis, other than that of guilt, is a question for the jury." Syllabus point 4, *State v. Bailey*, 151 W.Va. 796, 155 S.E.2d 850 (1967).' Syl. pt. 4, *State v. Meadows*, 172 W.Va. 247, 304 S.E.2d 831 (1983)." Syl. pt. 4, *State v. Gum*, 172 W.Va. 534, 309 S.E.2d 32 (1983).

The Court noted the jury was instructed that "circumstantial evidence must always be scanned with great caution and can never justify a verdict of guilty unless the circumstances proved are of such character as to produce upon a fair and unprejudiced mind a moral conviction of guilt of the accused beyond a reasonable doubt." No reason to set aside.

**Collateral crimes**

**Admissibility**

***State v. McGinnis***, 455 S.E.2d 516 (1994) (Cleckley, J.)

See EVIDENCE Admissibility, Collateral crimes, (p. 218) for discussion of topic.

**Other than accused**

***State v. Malick***, 457 S.E.2d 482 (1995) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 215) for discussion of topic.

**EVIDENCE**

**Collateral crimes** (continued)

**Same transaction**

***State v. McGhee***, 455 S.E.2d 533 (1995) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 216) for discussion of topic.

**Confessions**

**Admissibility**

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 597) for discussion of topic.

***State v. Farley***, 452 S.E.2d 50 (1994) (Cleckley, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 599) for discussion of topic.

***State v. Hopkins***, 453 S.E.2d 317 (1994) (Neely, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 602) for discussion of topic.

***State v. Moore***, 457 S.E.2d 801 (1995) (Neely, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Voluntariness, Intelligence a factor, (p. 608) for discussion of topic.

**EVIDENCE**

**Confessions** (continued)

**Voluntariness**

***State v. Honaker***, 454 S.E.2d 96 (1994) (Cleckley, J.)

See CONFESSIONS Voluntariness, (p. 153) for discussion of topic.

**Crimes unrelated to charge**

***State v. McGhee***, 455 S.E.2d 533 (1995) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 216) for discussion of topic.

**Driving under the influence**

**Sufficiency of evidence**

***Dean v. W.Va. Dept. of Motor Vehicles***, 464 S.E.2d 589 (1995) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Chemical test not required, (p. 189) for discussion of topic.

**DUI sobriety check points**

**Distinguished from license and registration check**

***State v. Davis***, 464 S.E.2d 598 (1995) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Sobriety check points, (p. 191) for discussion of topic.

**EVIDENCE**

**DUI sobriety check points** (continued)

**Notice of intent to challenge**

***Carte v. Cline***, 460 S.E.2d 48 (1995) (Fox, J.)

See DRIVING UNDER THE INFLUENCE Sobriety check points, Notice of intent to challenge, (p. 193) for discussion of topic.

**Exculpatory evidence**

**Duty to disclose**

***State v. Franklin***, 448 S.E.2d 158 (1994) (Per Curiam)

See EVIDENCE Exculpatory, Failure to disclose, (p. 270) for discussion of topic.

**Failure to disclose**

***State v. Franklin***, 448 S.E.2d 158 (1994) (Per Curiam)

Appellant was convicted of aggravated robbery. He claimed on appeal that the state's failure to disclose that several people were unable to identify appellant from photographic arrays constituted failure to disclose exculpatory evidence. Of seven persons, only one identified appellant.

Syl. pt. 3 - " 'A prosecution that withholds evidence which if made available would tend to exculpate an accused by creating a reasonable doubt as to his guilt violates due process of law under Article III, Section 14 of the *West Virginia Constitution*.' Syllabus Point 4, *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982)." Syl. pt. 4, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).

The Court found that the witnesses who could not identify appellant were unable to identify anyone from the arrays; no witnesses selected anyone other than appellant. Since no reasonable doubt was thereby created, it was not error to fail to disclose the other eyewitnesses. Affirmed.

**EVIDENCE**

**Exculpatory evidence** (continued)

**Failure to preserve**

***State v. Stuart***, 452 S.E.2d 886 (1994) (Cleckley, J.)

See SEARCH AND SEIZURE Warrantless search, Probable cause to stop for, (p. 590) for discussion of topic.

**Expert witnesses**

**Admissibility**

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See EVIDENCE Polygraph tests, (p. 285) for discussion of topic.

**Admissibility of opinion**

***Gentry v. Mangum***, 466 S.E.2d 171 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Scientific evidence, (p. 250) for discussion of topic.

***Mayhorn v. Logan Medical Foundation***, 454 S.E.2d 87 (1994) (McHugh, J.)

(**NOTE**: While not a criminal matter, this case is included because of its relevance to expert testimony).

Appellant filed a medical malpractice action regarding the death of her husband at appellee's facility. At trial appellant's expert medical witness relied on the autopsy report of another physician, which report had been admitted into evidence. The trial court ruled the testimony inadmissible since the expert's conclusion as to cause of death varied from the report's conclusion. Further, the hospital challenged whether the expert was qualified.

**EVIDENCE**

**Expert witnesses** (continued)

**Admissibility of opinion** (continued)

***Mayhorn v. Logan Medical Foundation***, (continued)

Syl. pt. 1 - "The admissibility of testimony by an expert witness is a matter within the sound discretion of the trial court, and the trial court's decision will not be reversed unless it is clearly wrong." Syl. pt. 6, *Helmick v. Potomac Edison Co.*, 185 W.Va. 269, 406 S.E.2d 700 (1991).

Syl. pt. 2 - Rule 703 of the *West Virginia Rules of Evidence* allows an expert to base his opinion on (1) personal observations; (2) facts or data, admissible in evidence, and presented to the expert at or before trial; and (3) information otherwise inadmissible in evidence, if this type of information is reasonably relied upon by experts in the witness' field.

Syl. pt. 3 - "In analyzing the admissibility of expert testimony under Rule 702 of the *West Virginia Rules of Evidence*, the trial court's initial inquiry must consider whether the testimony is based on an assertion or inference derived from the scientific methodology. Moreover, the testimony must be relevant to a fact at issue. Further assessment should then be made in regard to the expert testimony's reliability by considering its underlying scientific methodology and reasoning. This includes an assessment of (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory's actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community." Syl. pt. 2, *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993).

Syl. pt. 4 - Pursuant to *West Virginia Rules of Evidence* 702 an expert's opinion is admissible if the basic methodology employed by the expert in arriving at his opinion is scientifically or technically valid and properly applied. The jury, and not the trial judge, determines the weight to be given to the expert's opinion.

**EVIDENCE**

**Expert witnesses** (continued)

**Admissibility of opinion** (continued)

***Mayhorn v. Logan Medical Foundation***, (continued)

Syl. pt. 5 - " ' " 'Whether a witness is qualified to state an opinion is a matter which rests within the discretion of the trial court and its ruling on that point will not ordinarily be disturbed unless it clearly appears that its discretion has been abused.' Point 5, syllabus, *Overton v. Fields*, 145 W.Va. 797 117 S.E.2d 598 (1960)." Syllabus Point 4, *Hall v. Nello Teer Co.*, 157 W.Va. 582, 203 S.E.2d 145 (1974).' Syllabus Point 12, *Board of Education v. Zando, Martin & Milstead*, 182 W.Va. 597, 390 S.E.2d 796 (1990)." Syl. pt. 3, *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993).

Syl. pt. 6 - Rule 702 of the *West Virginia Rules of Evidence* is the paramount authority for determining whether or not an expert is qualified to give an opinion. Therefore, to the extent that *Gilman v. Choi*, 185 W.Va. 177, 406 S.E.2d 200 (1990) indicates that the legislature may by statute determine when an expert is qualified to state an opinion, it is overruled.

The Court found the expert's testimony admissible; relying on others' reports is acceptable.

Appellee based his challenge to appellant's expert on *W.Va. Code*, 55-7B-7. The court noted a distinction between a witness' competency under Rule 601 and an expert's qualifications under Rule 702. Rule 601 should not allow the Legislature to determine whether an expert is qualified. The Court has sole discretion to determine that question. *Art. VIII, Sec. 3, W.Va. Const*.

Here, the Court found no abuse of discretion in qualifying the witness as an expert.

***Mildred L.M. v. John O.F.***, 452 S.E.2d 436 (1994) (Cleckley, J.)

See PATERNITY Blood tests, When conclusive, (p. 492) for discussion of topic.

**EVIDENCE**

**Expert witnesses** (continued)

**Admissibility of opinion** (continued)

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

Appellant was convicted of first-degree murder. The Chief Medical Examiner filed a statement which contained the opinion that "in consideration of the circumstances surrounding disappearance and death, the case is considered as homicide unless proven otherwise." Despite a successful motion *in limine*, Dr. Sopher was allowed to testify that he considered the case a homicide based on statements from police regarding the disappearance of the body, the scenario of the death and the location of the skeleton. Dr. Sopher's death certificate indicating homicide was also admitted. Trial counsel did not object at trial, choosing instead to cross-examine Dr. Sopher in a manner that also violated the in limine order.

Syl. pt. 1 - " ' " ' "Failure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a . . . [forfeiture] of the right to raise the question thereafter in the trial court or in the appellate court." Point 6, *Yuncke v. Welker*, 128 W.Va. 299 [36 S.E.2d 410 (1945)].' Syllabus point 7, *State v. Cirullo*, 142 W.Va. 56, 93 S.E.2d 526 (1956)." Syl. Pt. 5, *State v. Davis*, 180 W.Va. 357, 376 S.E.2d 563 (1988).' Syllabus Point 1, *Daniel B. by Richard B. v. Ackerman*, 190 W.Va. 1, 435 S.E.2d 1 (1993)." Syl. pt. 5, *Tennant v. Marion Health Care Foundation, Inc.*, 194 W.Va. 97, 459 S.E.2d 374 (1995).

Syl. pt. 2 - " 'An objection to an adverse ruling on a motion in limine to bar evidence at trial will preserve the point, even though no objection was made at the time the evidence was offered, unless there has been a significant change in the basis for admitting the evidence.' Syllabus Point 1, *Wimer v. Hinkle*, 180 W.Va. 660, 379 S.E.2d 383 (1989)." Syl. pt. 6, *Bennett v. 3 C Coal Co.*, 180 W.Va. 665, 379 S.E.2d 388 (1989).

Syl. pt. 3 - "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

**EVIDENCE**

**Expert witnesses** (continued)

**Admissibility of opinion** (continued)

***State v. Garrett***, (continued)

The Court noted counsel moved to strike Dr. Sopher's testimony. The court denied the motion but gave a limiting instruction telling the jury they could reject the opinion.

The Court found failure to object to the testimony at trial precluded review on appeal. Because trial counsel won his motion to limit the testimony, that basis for appeal is also foreclosed. Finally, the Court refused to consider this matter to be plain error. An expert's testimony may be given such weight as the finder of fact may assign. No review.

**Qualifying as**

***Gentry v. Mangum***, 466 S.E.2d 171 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Scientific evidence, (p. 250) for discussion of topic.

**Extrajudicial statements**

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

See SIXTH AMENDMENT Right to counsel, Admissibility of extrajudicial statements, (p. 649) for discussion of topic.

***State v. Phillips***, 461 S.E.2d 75 (1995) (Cleckley, J.)

See RIGHT TO CONFRONT Admissibility of extrajudicial statements, (p. 566) for discussion of topic.

**EVIDENCE**

**Extrajudicial statements** (continued)

***State v. Shepherd***, 442 S.E.2d 440 (1994) (Per Curiam)

See BURDEN OF PROOF Witness unavailable, (p. 133) for discussion of topic.

**Hearsay**

**Admissibility (generally)**

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

See SIXTH AMENDMENT Right to counsel, Admissibility of extrajudicial statements, (p. 649) for discussion of topic.

***State v. Dillon***, 447 S.E.2d 583 (1994) (Workman, J.)

See EVIDENCE Admissibility, Tape recorded statements to informant, (p. 255, 256, 257, 258, 259) for discussion of topic.

***State v. Mason***, 460 S.E.2d 36 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Extrajudicial statements, (p. 226) for discussion of topic.

***State v. Phillips***, 461 S.E.2d 75 (1995) (Cleckley, J.)

See RIGHT TO CONFRONT Admissibility of extrajudicial statements, (p. 566) for discussion of topic.

**EVIDENCE**

**Hearsay** (continued)

**Confessions of third party**

***State v. Mason***, 460 S.E.2d 36 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Extrajudicial statements, (p. 226) for discussion of topic.

**Dying declaration**

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See EVIDENCE Admissibility, Dying declaration, (p. 222) for discussion of topic.

**Exceptions to**

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See EVIDENCE Admissibility, Dying declaration, (p. 222) for discussion of topic.

**Excited utterance**

***State v. Sutphin***, 466 S.E.2d 402 (1995) (Recht, J.)

See EVIDENCE Admissibility, Hearsay, (p. 235) for discussion of topic.

**Extrajudicial statements**

***State v. Phillips***, 461 S.E.2d 75 (1995) (Cleckley, J.)

See RIGHT TO CONFRONT Admissibility of extrajudicial statements, (p. 566) for discussion of topic.

**EVIDENCE**

**Hearsay** (continued)

**Indicia of trustworthiness**

***State v. Mason***, 460 S.E.2d 36 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Extrajudicial statements, (p. 226) for discussion of topic.

**Tape recorded statements to police**

***State v. Jarrell***, 442 S.E.2d 223 (1994) (Brotherton, J.)

See EVIDENCE Admissibility, Tape recorded statements to police, (p. 259) for discussion of topic.

**Threats by defendant**

***State v. Sutphin***, 466 S.E.2d 402 (1995) (Recht, J.)

See EVIDENCE Admissibility, Hearsay, (p. 235) for discussion of topic.

**Hearsay (witness unavailable)**

***State v. Dillon***, 447 S.E.2d 583 (1994) (Workman, J.)

See EVIDENCE Admissibility, Tape recorded statements to informant, (p. 255, 256, 257, 258, 259) for discussion of topic.

**Hypnotized witness**

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See WITNESSES Hypnotized, Use of testimony following, (p. 712) for discussion of topic.

## EVIDENCE

### Identification of defendant

#### Admissibility

***State v. Day***, 447 S.E.2d 576 (1994) (Per Curiam)

See IDENTIFICATION In court, Admissibility, (p. 346) for discussion of topic.

***State v. Franklin***, 448 S.E.2d 158 (1994) (Per Curiam)

See IDENTIFICATION In court, Admissibility, (p. 347) for discussion of topic.

### Impeachment

#### Criminal conviction

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

Appellant was found guilty of first-degree murder, without mercy. A prosecution witness was previously convicted of receiving stolen property. The trial court refused to allow impeachment based on the prior conviction.

Syl. pt. 1 - "Rule 609(a)(2) of the *West Virginia Rules of Evidence* divides the criminal convictions which can be used to impeach a witness other than a criminal defendant into two categories: (A) crimes 'punishable by imprisonment in excess of one year,' and (B) crimes 'involving dishonesty or false statements regardless of punishment.' " Syllabus Point 2, *CGM Contractors, Inc. v. Contractors Environmental Services, Inc.*, 181 W.Va. 679, 383 S.E.2d 861 (1989).

The crime at issue here was petit larceny, a crime punishable by one year or less. Further, crimes of this nature cannot be considered if the conviction came more than ten years prior to testimony; even if less than ten years old, the court must find the probative value greater than the prejudicial effect.

**EVIDENCE**

**Impeachment** (continued)

**Criminal conviction** (continued)

***State v. Jenkins***, (continued)

Crimes involving "dishonesty or false statement" can also be used for impeachment but the petit larceny here did not show deceit or falsification. No error in refusal to allow impeachment.

**Necessity to introduce primary evidence**

***State v. Honaker***, 454 S.E.2d 96 (1994) (Cleckley, J.)

See IMPEACHMENT Preservation of error, (p. 351) for discussion of topic.

**Inferences**

**Permissible argument from evidence**

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 549) for discussion of topic.

**Insanity**

**Lay persons' testimony**

***State v. Walls***, 445 S.E.2d 515 (1994) (Per Curiam)

See INSANITY Presumptions, (p. 377) for discussion of topic.

## EVIDENCE

### Late-discovered evidence

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See DISCOVERY Failure to disclose, Late-discovered evidence, (p. 176) for discussion of topic.

### Marital privilege

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Marital communications, (p. 239) for discussion of topic.

### Missing or unavailable

***State v. Osakalumi***, 461 S.E.2d 504 (1995) (McHugh, C.J.)

Appellant was convicted of first-degree murder. Police seized the couch upon which the victim was shot. However, after notifying the prosecuting attorney, they apparently disposed of the couch because it presented a fire and health hazard. They did not measure the couch, chart the location of the bullet hole or the bullet's trajectory. Although photographs were taken, they depicted only parts of the couch and were of no evidentiary value.

The bullet, some blood samples and bone fragments were delivered to the medical examiner nine months after the shooting but fourteen months prior to discovery of the skeletal remains. The examiner testified at trial, along with the investigating officer, who drew a diagram of the couch from memory but did not include dimensions or location of the bullet hole. A previous diagram drawn for the medical examiner was lost. The medical examiner drew a diagram of the diagram from memory during trial testimony.

**EVIDENCE**

**Missing or unavailable** (continued)

***State v. Osakalumi***, (continued)

During testimony, the medical examiner admitted that the evidence he was given was inconclusive as to whether the death was accidental, a suicide or a homicide. Nonetheless, he said "it is a homicide, based upon the alignment of the bullet and skull on the couch." Significant rebuttal testimony was introduced saying the trajectory could not be established since the couch was used for a significant period after the shooting; also, that it was impossible to determine that the bullet traveled in a straight line, as the medical examiner had testified.

Syl. pt. 1 - " 'The provisions of the Constitution of the State of West Virginia may, in certain instances, require higher standards of protection than afforded by the *Federal Constitution*.' Syllabus Point 2, *Pauley v. Kelly*, 162 W.Va. 672, 255 S.E.2d 859 (1979)." Syl. pt. 1, *State v. Bonham*, 173 W.Va. 416, 317 S.E.2d 501 (1984).

Syl. pt. 2 - When the State had or should have had evidence requested by a criminal defendant but the evidence no longer exists when the defendant seeks its production, a trial court must determine (1) whether the requested material, if in the possession of the State at the time of the defendant's request for it, would have been subject to disclosure under either *West Virginia Rule of Criminal Procedure* 16 or case law; (2) whether the State had a duty to preserve the material; and (3) if the State did have a duty to preserve the material, whether the duty was breached and what consequences should flow from the breach. In determining what consequences should flow from the State's breach of its duty to preserve evidence, a trial court should consider (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence produced at the trial to sustain the conviction.

The Court found the prosecution did not act in bad faith in allowing the couch to be destroyed. However, since the evidence here was crucial, good or bad faith was irrelevant. Cf. *Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L.Ed.2d 281 (1988).

**EVIDENCE**

**Missing or unavailable** (continued)

***State v. Osakalumi***, (continued)

Under West Virginia law, the standard is higher. The loss of the evidence here so fatally compromised appellant's ability to defend himself and cast doubt on the state's primary evidence (the medical examiner's testimony) that even a cautionary instruction was insufficient to cure the defect. Reversed and remanded.

**Motor vehicle check points**

***State v. Davis***, 464 S.E.2d 598 (1995) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Sobriety check points, (p. 191) for discussion of topic.

**Newly discovered evidence**

**Sufficient for new trial**

***State v. Crouch***, 445 S.E.2d 213 (1994) (Neely, J.)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 486) for discussion of topic.

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See NEW TRIAL Newly-discovered evidence, Sufficient for new trial, (p. 487) for discussion of topic.

## EVIDENCE

### Opinion of lay witness

#### Sufficient foundation for

***State v. Jameson***, 461 S.E.2d 67 (1995) (Per Curiam)

Appellant was convicted of murder in the arson of his wife's grandparents' home. At trial, a member of the local fire department was allowed to testify as to a "pour pattern" he noticed; a State Fire Marshall investigator gave essentially the same testimony. The trial court allowed the testimony on the grounds the witnesses were not giving an expert opinion, merely relating what they saw. Appellant claimed their testimony should have been excluded under Rule 701 of the *Rules of Evidence*.

Syl. pt. 4 - " 'The determination of whether a witness has sufficient knowledge of the material in question so as to be qualified to give his opinion is largely within the discretion of the trial court, and will not ordinarily be disturbed on appeal unless clearly erroneous.' *Cox v. Galigher Motor Sales Co.*, 158 W.Va. 685, 213 S.E.2d 475 (1975)." Syllabus point 3, *State v. Haller*, 178 W.Va. 642, 363 S.E.2d 719 (1987).

The Court found that both witnesses were professionals in fire fighting. Especially in light of the consistent testimony of two other witnesses as to the "pour pattern," the two witnesses' testimony at issue here was at worst cumulative. No error.

### Other crimes

***State v. McGhee***, 455 S.E.2d 533 (1995) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 216) for discussion of topic.

## EVIDENCE

### Photographs

#### Gruesome

***State v. Derr***, 451 S.E.2d 731 (1994) (Cleckley, J.)

See EVIDENCE Admissibility, Photographs, (p. 243) for discussion of topic.

### Polygraph tests

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

Appellant was convicted of first-degree murder. On appeal he claimed polygraph results should have been admitted.

Syl. pt. 1 - " 'Polygraph test results are not admissible in evidence in a criminal trial in this State.' Syl. Pt. 2, *State v. Frazier*, 162 W.Va. 602, 252 S.E.2d 39 (1979)." Syl. Pt. 1, *State v. Chambers*, 194 W.Va. 1, 459 S.E.2d 112 (1995).

Syl. pt. 2 - "In analyzing the admissibility of expert testimony under Rule 702 of the *West Virginia Rules of Evidence*, the trial court's initial inquiry must consider whether the testimony is based on an assertion or inference derived from the scientific methodology. Moreover, the testimony must be relevant to a fact at issue. Further assessment should then be made in regard to the expert testimony's reliability by considering its underlying scientific methodology and reasoning. This includes an assessment of (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory's actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community." Syl. Pt. 2, *Wilt v. Buracker*, 191 W.Va. 39, 443 S.E.2d 196 (1993), *cert. denied*, U.S., 114 S.Ct. 2137, 128 L.Ed.2d 867 (1994).

The Court noted that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993) did not change the rule in *Frazier*, *supra*. Although *Daubert* found Federal rules superseded the test in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), Rule 702 does not automatically allow for admission of tests which are not reliable.

**EVIDENCE**

**Polygraph tests** (continued)

***State v. Beard***, (continued)

The Court further noted that cautionary instructions cured any references to polygraph tests. No error.

**Reference to inadmissible**

***State v. Chambers***, 459 S.E.2d 112 (1995) (Neely, J.)

Appellant was convicted of first-degree arson. The prosecution introduced evidence that she was given an opportunity to take a polygraph test and refused.

Syl. pt. 1 - "Polygraph tests results are not admissible in evidence in a criminal trial in this State." Syl. Pt. 2, *State v. Frazier*, 162 W.Va. 602, 252 S.E.2d 39 (1979).

Syl. pt. 2 - Reference to an offer or refusal by a defendant to take polygraph test is inadmissible in criminal trials to the same extent that polygraph results are inadmissible.

In a similar case a police officer testified regarding a polygraph test without objection by defense counsel. The trial court refused a jury instruction regarding inadmissibility of the polygraph test. *State v. Wilson*, 190 W.Va. 583, 439 S.E.2d 448 (1993). The Court found plain error, despite the lack of an objection below.

The Court dismissed the prosecution's argument that no test results were here introduced and therefore no error committed. The same impermissible inferences of guilt were established as if the test results were discussed. Plain error. Reversed.

## EVIDENCE

### Privileges

#### Physician/patient privilege

***State ex rel. Allen v. Bedell***, 454 S.E.2d 77 (1994) (Workman, J.)

See DRIVING UNDER THE INFLUENCE Blood alcohol tests, (p. 187) for discussion of topic.

### Protected classes

#### Admissibility of evidence regarding

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 544) for discussion of topic.

### Psychological/psychiatric records

#### Of victim

***State v. Roy***, 460 S.E.2d 277 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Psychological/psychiatric, (p. 245) for discussion of topic.

### Psychological/psychiatric tests

#### Of victim

***State v. Roy***, 460 S.E.2d 277 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Psychological/psychiatric, (p. 245) for discussion of topic.

## EVIDENCE

### Rebuttal evidence

#### Right to when otherwise inadmissible

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 544) for discussion of topic.

### Relevancy

#### Scientific evidence

***Gentry v. Mangum***, 466 S.E.2d 171 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Scientific evidence, (p. 250) for discussion of topic.

### Reputation of accused

***State v. Roy***, 460 S.E.2d 277 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Reputation of accused, (p. 249) for discussion of topic.

### Scientific evidence

#### Admissibility

***Gentry v. Mangum***, 466 S.E.2d 171 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Scientific evidence, (p. 250) for discussion of topic.

**EVIDENCE**

**Spontaneous declarations/excited utterance**

***State v. Hopkins***, 453 S.E.2d 317 (1994) (Neely, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 602) for discussion of topic.

**Spousal immunity**

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Marital communications, (p. 239) for discussion of topic.

**Offense against child**

***State v. Malick***, 457 S.E.2d 482 (1995) (Per Curiam)

See IMMUNITY Spousal testimony, (p. 350) for discussion of topic.

**Spouse's grand jury testimony**

***State v. Jarrell***, 442 S.E.2d 223 (1994) (Brotherton, J.)

See IMMUNITY Spousal testimony, (p. 349) for discussion of topic.

**Standard for review**

**Sufficiency of circumstantial evidence**

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See EVIDENCE Circumstantial, Sufficiency of, (p. 266) for discussion of topic.

**EVIDENCE**

**Sufficiency of**

**Circumstantial evidence**

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See EVIDENCE Circumstantial, Sufficiency of, (p. 266) for discussion of topic.

**Sufficiency of evidence**

**Driving under the influence**

***Dean v. W.Va. Dept. of Motor Vehicles***, 464 S.E.2d 589 (1995) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Chemical test not required, (p. 189) for discussion of topic.

**Suicide note**

**Admissibility**

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See EVIDENCE Admissibility, Dying declaration, (p. 222) for discussion of topic.

**Tape recordings**

***DHHR ex rel. Wright v. David L.***, 453 S.E.2d 646 (1994) (Cleckley, J.)

See EVIDENCE Admissibility, Tape recordings, (p. 260) for discussion of topic.

## EVIDENCE

### Taped conversations

***State v. Dillon***, 447 S.E.2d 583 (1994) (Workman, J.)

See EVIDENCE Admissibility, Tape recorded statements to informant, (p. 255, 256, 257, 258, 259) for discussion of topic.

### Threats by defendant

***State v. Sutphin***, 466 S.E.2d 402 (1995) (Recht, J.)

See EVIDENCE Admissibility, Hearsay, (p. 235) for discussion of topic.

### Transcripts of audio or video tapes

***State v. Hardesty***, 461 S.E.2d 478 (1995) (Fox, J.)

See EVIDENCE Admissibility, Transcripts of audio or video tapes, (p. 263) for discussion of topic.

### Wiretaps

***DHHR ex rel. Wright v. David L.***, 453 S.E.2d 646 (1994) (Cleckley, J.)

See EVIDENCE Admissibility, Tape recordings, (p. 260) for discussion of topic.

## EVIDENCE

### Witnesses

#### Reputation for truthfulness

***State v. Wood***, 460 S.E.2d 771 (1995) (McHugh, C.J.)

Appellant was convicted of first-degree sexual assault and incest. The victim first described the assaults to her behavior disorder teacher, who testified at trial. The teacher testified that the victim would always tell the truth when pressed. The teacher's account of the victim's confidences were admitted for the truth of the victim's assertions.

Syl. pt. 1 - "To trigger application of the 'plain error' doctrine, there must be (1) an error, (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 2 - *West Virginia Rules of Evidence* 608(a) permits the admission of evidence in the form of an opinion or reputation regarding a witness's character for truthfulness or untruthfulness, subject to two limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness; and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise. The admission of testimony pursuant to *W.Va.R.Evid*. 608(a) is within the sound discretion of the trial judge and is subject to *W.Va.R.Evid*. 402, which requires the evidence to be relevant; *W.Va.R.Evid*. 403, which requires the exclusion of evidence whose "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury[;]" and *W.Va.R.Evid*. 611, which requires the court to protect witnesses from harassment and undue embarrassment.

The Court noted opinion testimony as to the truth of a particular assertion is forbidden by Rule 608(a)(1). *State v. Rimmasch*, 775 P.2d 388 (Utah 1989). See also, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990); expert on abuse "may not give an opinion as to whether he personally believes the child...."

**Witnesses** (continued)

**Reputation for truthfulness** (continued)

***State v. Wood***, (continued)

The witness here impermissibly gave his opinion as to the victim's truthfulness on a specific occasion; and offered the testimony prior to the victim's character being attacked. To offer testimony as to truthfulness prior to a question being raised amounts to "bolstering" the victim's assertions. However, no objection was made and the Court chose not to treat the admission as plain error in that it did not seriously affect the fairness of the trial. Syl. Pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). No error.

## *EX POST FACTO*

### Procedural changes

***State v. Wood***, 460 S.E.2d 771 (1995) (McHugh, C.J.)

See SENTENCING *Ex post facto* application, (p. 621) for discussion of topic.

### Sentencing

***State v. Wood***, 460 S.E.2d 771 (1995) (McHugh, C.J.)

See SENTENCING *Ex post facto* application, (p. 621) for discussion of topic.

## EXCULPATORY EVIDENCE

### Failure to preserve

***State v. Stuart***, 452 S.E.2d 886 (1994) (Cleckley, J.)

See SEARCH AND SEIZURE  Warrantless search, Probable cause to stop for, (p. 590) for discussion of topic.

## EXPERT WITNESSES

### Admissibility

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See EVIDENCE Polygraph tests, (p. 285) for discussion of topic.

### Admissibility of opinion

***Mayhorn v. Logan Medical Foundation***, 454 S.E.2d 87 (1994) (McHugh, J.)

See EVIDENCE Expert witnesses, Admissibility of opinion, (p. 271) for discussion of topic.

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

See EVIDENCE Expert witnesses, Admissibility of opinion, (p. 274) for discussion of topic.

### Indigents right to

***State ex rel. Rojas v. Wilkes***, 455 S.E.2d 575 (1995) (Fox, J.)

Petitioner was indicted for first-degree murder. He was given appointed counsel but his family raised money to hire a private-pay attorney, Kevin Mills. Mr. Mills moved for state-funded expert witness fees, or, alternatively, for appointment of publicly-funded co-counsel.

The circuit court ruled that by divesting himself of his original appointed counsel, petitioner waived further rights to co-counsel. It was undisputed that petitioner was and remained eligible for appointed counsel throughout these proceedings. Judge Wilkes argued that accepting private-pay counsel made petitioner ineligible for any sort of publicly-funded supplemental aid.

**EXPERT WITNESSES**

**Indigents right to** (continued)

***State ex rel. Rojas v. Wilkes***, (continued)

Syl. pt. 1 - Under *W.Va. Code*, § 29-21-16(f) (1992), a trial judge is permitted a continuing inquiry beyond a criminal defendant's financial affidavit requesting publicly funded legal counsel, and may question additional circumstances relating to the defendant's request for indigent status. If financial assistance provided by a third party makes it possible for an indigent criminal defendant to have the benefit of private counsel, subjects of judicial inquiry may include the source of the funds with which private counsel was retained, the terms of the legal representation agreement, and the reasonableness of the fee arrangement.

Syl. pt. 2 - "In evaluating a motion under *W.Va. Code*, 51-11-8 for additional expert fees, the trial judge should accord considerable weight to the representations in the defense counsel's motion, but should also engage in independent inquiry as to the need for the expert if he believes that such inquiry is necessary. In ruling on the motion, the trial judge should grant it if he determines that the assistance of the expert is reasonably necessary to defense counsel's development of relevant issue in the case." Syllabus point 2, *State ex rel. Foster v. Luff*, 164 W.Va. 413, 264 S.E.2d 477 (1980).

Syl. pt. 3 - Financial assistance provided by a third party which enables an indigent criminal defendant to have the benefit of private counsel is not relevant to the defendant's right to have expert assistance provided at public expense. A criminal defendant who qualifies as an indigent person is entitled to receive publicly funded expert assistance deemed essential to conducting an effective defense.

The Court held petitioner entitled to publicly-funded expenses so long as he is truly indigent. Writ granted. If the circuit court found expert assistance necessary, public funds to be expended.

**Judicial notice of test reliability**

***Mildred L.M. v. John O.F.***, 452 S.E.2d 436 (1994) (Cleckley, J.)

See PATERNITY Blood tests, When conclusive, (p. 492) for discussion of topic.

## EXPERT WITNESSES

### Psychological testing

#### Child sexual abuse

***State v. Wood***, 460 S.E.2d 771 (1995) (McHugh, C.J.)

See EVIDENCE Admissibility, Expert opinion, (p. 224) for discussion of topic.

### Qualifying as such

***State v. Wood***, 460 S.E.2d 771 (1995) (McHugh, C.J.)

See EVIDENCE Admissibility, Expert opinion, (p. 224) for discussion of topic.

#### Two-part test for

***Gentry v. Mangum***, 466 S.E.2d 171 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Scientific evidence, (p. 250) for discussion of topic.

### Request for

#### Failure to preserve

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

See APPOINTED COUNSEL Denial of expert witness, (p. 43) for discussion of topic.

## EXPERT WITNESSES

### Weight to be given

***Mildred L.M. v. John O.F.***, 452 S.E.2d 436 (1994) (Cleckley, J.)

See PATERNITY Blood tests, When conclusive, (p. 492) for discussion of topic.

## EXTRADITION

### Basis for

#### Fugitive warrant

***State ex rel. Coryell v. Gooden***, 457 S.E.2d 138 (1995) (Per Curiam)

See EXTRADITION Sufficient evidence for, (p. 300) for discussion of topic.

### Fugitives

***State ex rel. Coryell v. Gooden***, 457 S.E.2d 138 (1995) (Per Curiam)

See EXTRADITION Sufficient evidence for, (p. 300) for discussion of topic.

### Sufficient evidence for

***State ex rel. Coryell v. Gooden***, 457 S.E.2d 138 (1995) (Per Curiam)

Petitioner was denied writ of habeas corpus pursuant to her arrest and extradition to Pennsylvania to face charges of interference with child custody. Petitioner's parents were granted custody of her children and her husband given visitation rights. In 1982, when he attempted to see his children in Pennsylvania, the criminal complaint alleged that petitioner took them away and he has not seen them to date.

Five years later a bench warrant was issued for petitioner, alleging she failed to appear to answer allegations she failed to comply with custody and visitation agreements. Subsequently, petitioner's husband also filed the criminal complaint underlying these proceedings.

**EXTRADITION**

**Sufficient evidence for** (continued)

***State ex rel. Coryell v. Gooden***, (continued)

Syl. pt. 1 - " 'In habeas corpus proceedings instituted to determine the validity of custody where petitioners are being held in connection with extradition proceedings, the asylum state is limited to considering whether the extradition papers are in proper form; whether there is a criminal charge pending in the demanding state; whether the petitioner was present in the demanding state at the time the criminal offense was committed; and whether the petitioner is the person named in the extradition papers." Point 2, Syllabus, *State ex rel. Mitchell v. Allen*, 155 W.Va. 530, 185 S.E.2d 355 (1971)." Syl. pt. 1, *State ex rel. Gonzales v. Wilt*, 163 W.Va. 270, 256 S.E.2d 15 (1979).

Syl. pt. 2 - " 'To be a "fugitive from justice," it is necessary that the person charged as such must have been actually present in the demanding state at the time of the commission of the crime, or, having been there, has then committed some overt act in furtherance of the crime subsequently consummated, and has departed to another jurisdiction. And, if the evidence be clear and convincing that the accused was not personally in the demanding state at the time of the commission of the offense charged, and has committed no prior overt act therein indicative of an intent to commit the crime, or which can be construed as a step in the furtherance of the crime afterwards consummated, he should be discharged.' Syl. pt. 2, *State ex rel. Blake v. Doeppe*, 97 W.Va. 203, 124 S.E. 667 (1924)." Syl. pt. 2, *Lott v. Bechtold*, 169 W.Va. 578, 289 S.E.2d 210 (1982).

Syl. pt. 3 - "A rendition warrant issued by the Governor of this State under *W.Va. Code*, 5-1-8(a) [1937], in response to a request for extradition from the executive authority of a demanding state pursuant to the Uniform Criminal Extradition Act, *as amended*, *W.Va. Code*, 5-1-7 to 5-1-13, 'substantially recite[s] the facts necessary to the validity of its issuance' with respect to the crime charged therein, as required by *W.Va. Code*, 5-1-8(a) [1937], if the rendition warrant contains a statement that gives the person sought to be extradited reasonable notice of the nature of the crime charged in the demanding state; and a circuit court, when determining the sufficiency of a rendition warrant in a habeas corpus proceeding challenging the validity of custody in connection with extradition proceedings, may examine underlying documents filed by the demanding state in support of its request for extradition." Syl. pt. 2, *Cronauer v. State*, 174 W.Va. 91, 322 S.E.2d 862 (1984).

**Sufficient evidence for** (continued)

***State ex rel. Coryell v. Gooden***, (continued)

Syl. pt. 4 - "In the absence of evidence to the contrary public officers will be presumed to have properly performed their duties and not to have acted illegally, but regularly and in a lawful manner." Syl. pt. 2, *State ex rel. Staley v. County Court*, 137 W.Va. 431, 73 S.E.2d 827 (1952).

The Court found petitioner failed to meet the burden of proving she was not in the demanding state at the time of the commission of the crime. The evidence was conflicting, and a habeas corpus proceeding is not the proper proceeding to resolve conflicting testimony.

Further, the Court found the rendition warrant gave sufficient notice of the crime, as required by *W.Va. Code*, 5-1-8(a). The bench warrant, issued for civil contempt, was insufficient to overcome the presumption that the extradition was proper. The Court found the asylum state (Pennsylvania) should determine petitioner's other complaints of being tried on charges other than the subject of the extradition and on the issue of whether the statute underlying the criminal charge was amended. No error.

## FAMILY LAW MASTER

### Appearance of impropriety

***In the Matter of Means***, 452 S.E.2d 696 (1994) (Miller, J.)

See FAMILY LAW MASTER Discipline, Conflict of interest with litigant, (p. 303) for discussion of topic.

### Discipline

#### Conflict of interest with litigant

***In the Matter of Means***, 452 S.E.2d 696 (1994) (Miller, J.)

Family Law Master Means presided over a domestic case in which the husband was represented by David Lockwood. Mr. Means and Mr. Lockwood own equally the shares of a corporation. Mr. Means lives on the corporation's property rent-free. Mr. Means refused to disqualify himself and the circuit court refused a writ of prohibition to keep him from hearing the case.

Syl. pt. 1 - " 'The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings.' Syl. pt. 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980)." Syllabus, *In the Matter of Gorby*, 176 W.Va. 11, 339 S.E.2d 697 (1985).

Syl. pt. 2 - "Under Rule III(C)(13) [1992] of the *West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges, Magistrates and Family Law Masters*, the Judicial Hearing Board is limited to making a 'written recommendation, which shall contain findings of fact, conclusions of law and proposed disposition.' Because of the Board's limited judicial capacity, the Board is without authority to make a legal decision that is entitled to preclusive or res judicata effect." Syllabus point 3, *In the Matter of Hey*, 188 W.Va. 545, 425 S.E.2d 221 (1992).

Syl. pt. 3 - Canon 5C(1) of the *Judicial Code of Ethics* makes it impermissible for a judge to have continuing financial and business dealings with a lawyer who appears before the judge.

**FAMILY LAW MASTER**

**Discipline** (continued)

**Conflict of interest with litigant** (continued)

***In the Matter of Means***, (continued)

The Court found Mr. Means should have recused himself. Violation of former Canon 5C(1) of the *Judicial Code of Ethics* (similar to current Canon 4D(1) of the Code of Judicial Conduct). Public reprimand (no costs).

**Public reprimand**

***In the Matter of Means***, 452 S.E.2d 696 (1994) (Miller, J.)

See FAMILY LAW MASTER Discipline, Conflict of interest with litigant, (p. 303) for discussion of topic.

**Discretion**

**Home study in abuse and neglect**

***DHHR ex rel. Wright v. David L.***, 453 S.E.2d 646 (1994) (Cleckley, J.)

See EVIDENCE Admissibility, Tape recordings, (p. 260) for discussion of topic.

**Public reprimand**

***In the Matter of Means***, 452 S.E.2d 696 (1994) (Miller, J.)

See FAMILY LAW MASTER Discipline, Conflict of interest with litigant, (p. 303) for discussion of topic.

**FELONY-MURDER**

**Indictment**

**Sufficiency of**

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

See HOMICIDE Indictment, Sufficiency of, (p. 336) for discussion of topic.

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See INSTRUCTIONS Murder, (p. 387) for discussion of topic.

**Instructions**

**Sufficiency of**

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See INSTRUCTIONS Murder, (p. 387) for discussion of topic.

## FIFTH AMENDMENT

### Confessions

#### Admissibility

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 597) for discussion of topic.

### Waiver of

#### Psychological examination

***State v. Bush***, 442 S.E.2d 437 (1994) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Psychological/psychiatric examination, Waiver during, (p. 606) for discussion of topic.

**FIRST AMENDMENT**

**Free speech**

**Judge's right to**

***In the Matter of Hey***, 457 S.E.2d 509 (1995) (Per Curiam)

See JUDGES  Discipline, Right to free speech, (p. 402) for discussion of topic.

***In the Matter of Hey***, 452 S.E.2d 24 (1994) (Cleckley, J.)

See JUDGES  Discipline, Right to free speech, (p. 403) for discussion of topic.

## FORFEITURE

### Probable cause required

***Lawrence Frail v. $24,900, Palmero and Rivera***, 453 S.E.2d 307 (1994) (Miller, J.)

Appellant Palmero was stopped on the West Virginia Turnpike for an allegedly improper lane change. His driver's license address did not match the address he gave the trooper. Upon a consensual search of the vehicle, $24,600 in United States currency was found. A police dog did not detect drugs, but did detect drug traces on the currency. After seizure of the funds, it was determined that Palmero was on bond from a federal indictment for conspiracy to distribute cocaine. Palmero carried a beeper but did not appear to know how to operate it. He also had an additional $497.00 on his person, $300.00 of which he gave to his companion so that the companion could get a motel room and return to Cleveland.

Prosecuting attorney Frail filed a petition for forfeiture pursuant to *W.Va. Code*, 60A-7-701, *et seq*. Notice was sent to Palmero's address as listed on his driver's license and to the address he gave the trooper; notice was also given by publication pursuant to *W.Va. Code*, 60A-7-7-5(b). Petitioner did not respond. The circuit court found probable cause to seize the funds and ordered forfeiture. Petitioner now alleges lack of probable cause and improper notice.

Syl. pt. 1 - West Virginia Code, 60A-7-703(a)(6) (1988), which is part of the West Virginia Contraband Forfeiture Act (WVCFA), provides that moneys, negotiable instruments, and other things of value furnished or intended to be furnished in violation of the WVCFA in exchange for a controlled substance, and all proceeds traceable to such exchange, are subject to forfeiture.

Syl. pt. 2 - West Virginia Code, 60A-7-704(b)(4) (1988), allows property which is subject to forfeiture to be seized without process if there is probable cause to believe that the property was used or intended for use in violation of the West Virginia Contraband Forfeiture Act.

Syl. pt. 3 - Under West Virginia Code, 60A-7-705(a)(4) (1988), probable cause to believe that the property seized is subject to the forfeiture provisions of the West Virginia Contraband Forfeiture Act must exist at the time the petition for forfeiture is filed.

**FORFEITURE**

**Probable cause required** (continued)

***Lawrence Frail v. $24,900, Palmero and Rivera***, (continued)

Syl. pt. 4 - In a forfeiture proceeding under the West Virginia Contraband Forfeiture Act, the State must have probable cause to believe that the property is subject to forfeiture, which means more than a mere suspicion, but less than prima facie proof.

Syl. pt. 5 - Under West Virginia Code, 60A-7-703(a)(6) (1988), the State, in forfeiting property, is required to demonstrate that there is probable cause to believe there is a substantial connection between the property seized and the illegal drug transaction. This finding is in addition to the initial finding of probable cause that an illegal act under the drug law has occurred.

Quoting *United States v. $191,910.00 in United States Currency*, 16 F.3rd 1051 (9th Cir. 1994), the Court noted the probable cause requirement is similar to that required for a search warrant and must have specific connection to an illegal activity prohibited by the statute. See *State v. Worley*, 179 W.Va. 403, 409, 369 S.E.2d 706, 712 (1988). See also, *United States v. Borromeo*, 995 F.2d 23 (4th Cir. 1993); *United States v. Four Million, Two Hundred Fifty-Five Thousand*, 762 F.2d 895 (11th Cir. 1985); and *United States v. $7,850.00 in United States Currency*, 7 F.3d 1355 (8th Cir. 1993).

Noting further that carrying large amounts of currency and being evasive is usually insufficient to establish probable cause to seize, the Court found no evasiveness here. Notice of seizure was accepted at petitioner's address and petitioner had an explanation for the large amount of currency. Because the dog did not detect drugs (and currency may be generally contaminated) and the bond violation was not connected to the funds, no probable cause to forfeit. Reversed.

## FORGERY

### Elements of

***State v. Phalen***, 452 S.E.2d 70 (1994) (McHugh, J.)

Appellant was convicted of one count of forgery. He was arrested on DUI charges, registered a .239% blood alcohol, and gave police his brother-in-law's name, date of birth and social security number. When police checked the drivers license records, they found a clean record, while appellant's license had been revoked for three DUI arrests. Appellant was charged with first offense DUI, was fingerprinted and signed "Harry C. Shultz" on the fingerprint card.

Although appellant signed "Harry C. Shultz" at magistrate court, he told the deputy upon leaving that he was not Shultz. He refused to reveal his true identity but a search disclosed it. Appellant was re-arraigned, charged with third offense DUI, driving on suspended license, forgery and obstructing an officer. Appellant challenged whether all the necessary elements of forgery were present sufficient to sustain his conviction, specifically, that no injury was shown to an individual or to the State; he also claimed he was too intoxicated to form the requisite intent.

Syl. pt. 1 - "In a criminal case, a verdict of guilt will not be set aside on the ground that is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syl. pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 2 - "To sustain a conviction for forgery under *W.Va. Code*, 61-4-5 (1961), the State must prove the following elements: (1) that the accused falsely made or altered a writing; (2) that he or she did so with intent to defraud; and (3) that the writing so created or altered is of such a nature that if it were genuine it could prejudice the legal rights of another." Syl. pt. 1, *State v. Kelly*, 183 W.Va. 509, 396 S.E.2d 471 (1990).

**FORGERY**

**Elements of** (continued)

***State v. Phalen***, (continued)

Syl. pt. 3 - "It is not necessary to show actual prejudice to the rights of another to sustain a forgery conviction. It is sufficient if there is intent to defraud and potential prejudice to the rights of another." Syl. pt. 2, *State v. Kelly*, 183 W.Va. 509, 396 S.E.2d 471 (1990).

Syl. pt. 4 - It is a jury question as to whether the requisite intent to commit forgery, pursuant to *W.Va. Code*, 61-4-5 [1961], is present when a person who has given a false name later admits the name given was false. Additionally, a jury may find that giving a false name on a police fingerprint card constitutes forgery since the act prejudices the legal rights of the State by frustrating the State's authority to administer justice.

Syl. pt. 5 - "Voluntary drunkenness does not ordinarily excuse a crime." Syl. pt. 8, *State v. Bailey*, 159 W.Va. 167, 220 S.E.2d 432 (1975), *overruled on other grounds*, *State ex rel. D.D.H. v. Dostert*, 165 W.Va. 448, 269 S.E.2d 401 (1980).

The Court noted no actual prejudice to another need result; nor need the forgery succeed. *State v. Runnion*, 122 W.Va. 134, 7 S.E.2d 648 (1940). Further, the State's rights were actually prejudiced because justice was frustrated. *State v. Johnson*, 855 S.W.2d 470 (Mo.Ct.App. 1993).

Appellant testified that he had no memory of what occurred and had been taking lithium. His counsel testified that he was an alcoholic suffering from post-traumatic stress (Vietnam veteran). However, appellant correctly remembered his brother-in-law's social security number and court personnel; police testified that he appeared coherent. Affirmed.

**Intent to commit**

***State v. Phalen***, 452 S.E.2d 70 (1994) (McHugh, J.)

See FORGERY Elements of, (p. 310) for discussion of topic.

**FOURTEENTH AMENDMENT**

**Right to impartial jury**

**Bailiff as witness**

***State v. Kelley***, 451 S.E.2d 425 (1994) (McHugh, J.)

See WITNESSES  Bailiff as witness, (p. 707) for discussion of topic.

## FOURTH AMENDMENT

### Confessions

#### Voluntariness

***State v. Jones***, 456 S.E.2d 459 (1995) (Cleckley, J.)

See SELF-INCRIMINATION Statements by defendant, (p. 594) for discussion of topic.

### Evidence from citizen's arrest

***State v. Farmer***, 454 S.E.2d 378 (1994) (McHugh, J.)

See ARREST Citizen's arrest, (p. 46) for discussion of topic.

### Search of vehicle

#### Incident to investigative stop

***Hill v. Cline***, 457 S.E.2d 113 (1995) (Neely, J.)

See SEARCH AND SEIZURE Warrantless search, Probable cause for, (p. 588) for discussion of topic.

### Sobriety check points

***State v. Davis***, 464 S.E.2d 598 (1995) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Sobriety check points, (p. 191) for discussion of topic.

**FOURTH AMENDMENT**

**Warrantless search**

**Consent to**

***State v. Buzzard***, 461 S.E.2d 50 (1995) Workman, J.)

See SEARCH AND SEIZURE Warrantless search, Consent to, (p. 584) for discussion of topic.

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

See SEARCH AND SEIZURE Warrantless search, Consent to, (p. 587) for discussion of topic.

**FREE SPEECH**

**Judge's right to**

**Extrajudicial statements**

***In the Matter of Hey***, 457 S.E.2d 509 (1995) (Per Curiam)

See JUDGES Discipline, Right to free speech, (p. 402) for discussion of topic.

***In the Matter of Hey***, 452 S.E.2d 24 (1994) (Cleckley, J.)

See JUDGES Discipline, Right to free speech, (p. 403) for discussion of topic.

## FREEDOM OF INFORMATION ACT

### Juveniles

#### Confidentiality of records

***Ogden Newspapers v. City of Williamstown***, 453 S.E.2d 631 (1994) (Neely, J.)

See JUVENILES Confidentiality of records, (p. 435) for discussion of topic.

**FUGITIVES**

**Extradition**

***State ex rel. Coryell v. Gooden***, 457 S.E.2d 138 (1995) (Per Curiam)

See EXTRADITION Sufficient evidence for, (p. 300) for discussion of topic.

## GRAND JURY

### Amending indictment

***State v. Adams***, 456 S.E.2d 4 (1995) (Cleckley, J.)

See INDICTMENT Sufficiency of, Amendment by grand jury, (p. 356) for discussion of topic.

### Citizen's access to

***State ex rel. R.L. v. Bedell***, 452 S.E.2d 893 (1994) (Neely, J.)

See INDICTMENT Attestation by prosecuting attorney not required, (p. 352) for discussion of topic.

### Disqualification of member

#### Effect on indictment

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

See INDICTMENT Sufficiency of, Grand juror disqualified, (p. 358) for discussion of topic.

### Subpoena

#### Attorney-client privilege as protection against

***State ex rel. Doe v. Troisi***, 459 S.E.2d 139 (1995) (Cleckley, J.)

See SUBPOENAS Attorney-client privilege, When effective against, (p. 660) for discussion of topic.

## *GUARDIAN AD LITEM*

### Abuse and neglect

#### Duty of counsel

***In the Matter of Brian D. v. Nanny***, 461 S.E.2d 129 (1995) (Workman, J.)

See ABUSE AND NEGLECT Improvement period, Case plan required, (p. 6) for discussion of topic.

### Appointment of

#### Abuse and neglect

***In the Matter of Lindsey C.***, 473 S.E.2d 110 (1995) (Albright, J.)

See TERMINATION OF PARENTAL RIGHTS Guardian required, (p. 678) for discussion of topic.

#### Involuntary commitment

***In the Matter of Lindsey C.***, 473 S.E.2d 110 (1995) (Albright, J.)

See TERMINATION OF PARENTAL RIGHTS Guardian required, (p. 678) for discussion of topic.

#### Non-eligible proceedings

***Quesinberry v. Quesinberry***, 443 S.E.2d 222 (1994) (Neely, J.)

The Circuit Court of Mercer County appointed private counsel to pursue various matters relating to divorce actions for incarcerated persons, one of whom was in custody in North Carolina. Pursuant to Rule 17(c) *W.V.R.C.P.* the court appointed Thomas L. Berry and Rebecca M. Bell as *guardians ad litem*. Mr. Berry represented the interests of the inmate, while Ms. Bell represented the interests of a child who had been declared illegitimate in the divorce action.

**Appointment of** (continued)

**Non-eligible proceedings** (continued)

***Quesinberry v. Quesinberry***, (continued)

In an action to certify questions to this Court, the circuit court found the Administrative Office of the Supreme Court to be the only legally responsible party to pay.

Syl. pt. 1 - Because there is neither a valid statute nor an appropriation for an expenditure providing compensation to a lawyer appointed as a *guardian ad litem* for an incarcerated convict named as a defendant in a civil action, there exists no lawful authority for a trial court to order, or the Administrative Director to pay the *guardian ad litem* fees in such an action.

Syl. pt. 2 - Pursuant to *W.V.R.C.P.*, Rule 17(c) [1978], the appointment of a *guardian ad litem* for an incarcerated convict in a civil action is not mandatory if the court can reasonably order another appropriate remedy while the convict remains under the legal disability of incarceration. There are several alternatives to appointment of a *guardian ad litem* for indigent incarcerated defendants. If the term of confinement of a prisoner is not long, the court may defer the action against the prisoner until release, provided that such a continuance is not prohibited by law and postponement of the action will not substantially prejudice the rights of the adverse party. If a continuance is not feasible, the court should determine whether a *guardian ad litem* is essential for the protection of the incarcerated defendant's rights under the particular circumstances of the pending action. If, for example, the prisoner is not contesting the suit, there is no need for counsel. Even if the prisoner is contesting any aspect of the suit, the court should determine whether an adverse judgment against the prisoner on the contested issues would affect any present or future property rights.

Syl. pt. 3 - Under *W.Va. Code*, 29-21-1 *et seq*. [1990], if compensation for a *guardian ad litem* appointed for an infant child in an action initiated to disprove that child's paternity cannot be ordered paid by either of the parties pursuant to Rule XIII of the *Trial Court Rules for the Trial Courts of Record* by reason of indigency, the minor child is "an eligible client" and the paternity proceeding is an "eligible proceeding" requiring payment through the Office of Public Defender Services.

**Appointment of** (continued)

**Non-eligible proceedings** (continued)

***Quesinberry v. Quesinberry***, (continued)

Syl. pt. 4 - Although lawyers have the right to be fairly compensated, in a limited number of instances where a court determines that the services of counsel are essential to see that justice is done in private civil litigation, a court may appoint a lawyer to serve an indigent person.

Certified questions answered.

**Competency**

**Determination of**

***State ex rel. Shamblin v. Collier***, 445 S.E.2d 736 (1994) (Workman, J.)

See COMPETENCY Standard for, (p. 147) for discussion of topic.

**Duty**

**Abuse and neglect**

***In the Matter of Brian D. v. Nanny***, 461 S.E.2d 129 (1995) (Workman, J.)

See ABUSE AND NEGLECT Improvement period, Case plan required, (p. 6) for discussion of topic.

**Required for involuntarily committed parent**

***In the Matter of Lindsey C.***, 473 S.E.2d 110 (1995) (Albright, J.)

See TERMINATION OF PARENTAL RIGHTS Guardian required, (p. 678) for discussion of topic.

*GUARDIAN AD LITEM*

**Service of process**

**On behalf of committed parent in termination**

***In the Matter of Lindsey C.***, 473 S.E.2d 110 (1995) (Albright, J.)

See TERMINATION OF PARENTAL RIGHTS Guardian required, (p. 678) for discussion of topic.

**GUILTY PLEA**

**Testimony against co-defendant following**

***State v. Farmer***, 445 S.E.2d 759 (1994) (Per Curiam)

See WITNESSES Co-defendant, (p. 709) for discussion of topic.

## HABEAS CORPUS

### Appeal by appointed counsel required

***State ex rel. Rock v. Parsons***, No. 23103 (12/8/95) (Per Curiam)

See APPOINTED COUNSEL Duty to represent, (p. 43) for discussion of topic.

### Contempt of court

***State ex rel. Skaggs v. Plumley***, No. 22074 (2/2/94) (Per Curiam)

Petitioner, a practicing attorney, sought writ of habeas corpus to compel his release from civil contempt resulting from behavior during a hearing which the presiding judge deemed threatening and offensive. The judge informed petitioner that he would be released from contempt by apologizing to the court and to the law enforcement officers involved; the fine would be suspended upon petitioner's seeking counseling.

The Court found the circuit court's reason for holding petitioner in contempt was to compel him to comply with the court's order to control his temper and stop attacking the court. *State ex rel. Robinson v. Michael*, 166 W.Va. 660, 276 S.E.2d 812 (1981); *Simmons v. Simmons*, 175 W.Va. 3, 330 S.E.2d 325 (1985). Writ denied; transcript ordered sent to Committee on Legal Ethics.

### Diet and medical care

***State ex rel. Carey v. Henning***, No. 22568 (12/14/94) (Per Curiam)

See JUDGES Duties, To rule in timely manner, (p. 413) for discussion of topic.

## HABEAS CORPUS

### Distinguished from appeal

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

Appellant was convicted of sexual assault. At trial the victim was allowed to testify even though arguably incompetent. Although a pretrial competency evaluation was requested, trial counsel did not pursue the matter at trial. The evaluation was denied. (For other matters, see this case under Ineffective Assistance, this Digest).

In an omnibus habeas hearing, the trial court found appellant was not deprived of a fair trial.

Syl. pt. 9 - "A habeas corpus proceeding is not a substitute for a writ of error in that ordinary trial error not involving constitutional violations will not be review." Syl. Pt. 4, *State ex rel. McMannis v. Mohn*, 163 W.Va. 129, 254 S.E.2d 805 (1979), *cert. denied*, 464 U.S. 831 (1983).

The errors complained of here should be raised on direct appeal; they do not rise to the level of constitutional error reviewable upon writ of habeas corpus. No error.

### Extradition

***State ex rel. Coryell v. Gooden***, 457 S.E.2d 138 (1995) (Per Curiam)

See EXTRADITION Sufficient evidence for, (p. 300) for discussion of topic.

### Fugitive warrants

***State ex rel. Coryell v. Gooden***, 457 S.E.2d 138 (1995) (Per Curiam)

See EXTRADITION Sufficient evidence for, (p. 300) for discussion of topic.

## HABEAS CORPUS

### Generally

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

See HABEAS CORPUS Distinguished from appeal, (p. 325) for discussion of topic.

### Ineffective assistance

***State ex rel. Bess v. Legursky***, 465 S.E.2d 892 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 371) for discussion of topic.

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

See INEFFECTIVE ASSISTANCE Habeas corpus, Development on, (p. 366) for discussion of topic.

#### Development of record for

***State v. Woods***, 460 S.E.2d 65 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 376) for discussion of topic.

### Juveniles

#### Release from evaluation

***State ex rel. E.K. v. Merrifield***, No. 22013 (2/17/94) (Per Curiam)

See JUVENILES Psychological/psychiatric evaluation, Release from, (p. 445) for discussion of topic.

## HABEAS CORPUS

### Medical care

***Wilson v. Hun***, 457 S.E.2d 662 (1995) (Per Curiam)

See PRISON/JAIL CONDITIONS Medical care, (p. 522) for discussion of topic.

### Prison/jail conditions

#### Diet and medical care

***State ex rel. Carey v. Henning***, No. 22568 (12/14/94) (Per Curiam)

See JUDGES Duties, To rule in timely manner, (p. 413) for discussion of topic.

#### Medical care

***Wilson v. Hun***, 457 S.E.2d 662 (1995) (Per Curiam)

See PRISON/JAIL CONDITIONS Medical care, (p. 522) for discussion of topic.

### Right to

***State ex rel. Ferrell v. Taylor***, No. 22284 (7/18/94) (Per Curiam)

Relator asked that respondent be compelled to conduct an evidentiary hearing on his omnibus habeas corpus petition. Relator was convicted of kidnaping, second-degree murder and third degree arson. His conviction was affirmed in *State v. Ferrell*, 184 W.Va. 123, 399 S.E.2d 834 (1990).

Relator claimed the state knowingly used perjured testimony; committed numerous acts of misconduct; that there was newly discovered evidence; and that he was denied effective assistance of counsel. Respondent allowed a hearing on some issues but denied a hearing on use of perjured testimony, prosecutorial misconduct and effective assistance of counsel.

**HABEAS CORPUS**

**Right to** (continued)

***State ex rel. Ferrell v. Taylor***, (continued)

The Court recognized that some issues like effectiveness of assistance and newly discovered evidence can only be raised after trial. For these issues and other constitutional rights, a habeas corpus hearing is appropriate. *Losh v. McKenzie*, 166 W.Va. 762, 277 S.E.2d 606 (1981). The Court found issues sufficient to justify a full hearing. Writ granted directing the circuit court to allow petitioner a full opportunity to develop evidence.

**Right to timely ruling on**

***State ex rel. Lynch v. MacQueen***, No. 22469 (10/18/94) (Per Curiam)

See JUDGES Duties, To rule in timely manner, (p. 414) for discussion of topic.

***State ex rel. Proctor v. Steptoe***, No. 22141 (5/20/94) (Per Curiam)

See JUDGES Duties, To rule in timely manner, (p. 414) for discussion of topic.

## HARMLESS ERROR

### Constitutional

#### Generally

***State v. Jenkins***, 466 S.E.2d 471 (1995) (McHugh, C.J.)

See EVIDENCE Admissibility, Authentication of evidence, (p. 212) for discussion of topic.

***State v. Kelley***, 451 S.E.2d 425 (1994) (McHugh, J.)

See WITNESSES Bailiff as witness, (p. 707) for discussion of topic.

#### Grounds for reversal

***State v. Mayo***, 443 S.E.2d 236 (1994) (Miller, J.)

See HOMICIDE Attempted murder, (p. 332) for discussion of topic.

## HEARSAY

### Admissibility

***Hamilton v. Ravasio***, 451 S.E.2d 749 (1994) (Per Curiam)

See EVIDENCE Admissibility, Hearsay, (p. 232) for discussion of topic.

### Present sense impression

***State v. Phillips***, 461 S.E.2d 75 (1995) (Cleckley, J.)

See RIGHT TO CONFRONT Admissibility of extrajudicial statements, (p. 566) for discussion of topic.

### State of mind

***State v. Phillips***, 461 S.E.2d 75 (1995) (Cleckley, J.)

See RIGHT TO CONFRONT Admissibility of extrajudicial statements, (p. 566) for discussion of topic.

### Threats by defendant

***State v. Sutphin***, 466 S.E.2d 402 (1995) (Recht, J.)

See EVIDENCE Admissibility, Hearsay, (p. 235) for discussion of topic.

### Excited utterance

***State v. Sutphin***, 466 S.E.2d 402 (1995) (Recht, J.)

See EVIDENCE Admissibility, Hearsay, (p. 235) for discussion of topic.

## HEARSAY

### Hearsay within hearsay

***State v. Sutphin***, 466 S.E.2d 402 (1995) (Recht, J.)

See EVIDENCE Admissibility, Hearsay, (p. 235) for discussion of topic.

### Tape recorded statements to police

***State v. Jarrell***, 442 S.E.2d 223 (1994) (Brotherton, J.)

See EVIDENCE Admissibility, Tape recorded statements to police, (p. 259) for discussion of topic.

### Threats by defendant

***State v. Sutphin***, 466 S.E.2d 402 (1995) (Recht, J.)

See EVIDENCE Admissibility, Hearsay, (p. 235) for discussion of topic.

## HOMICIDE

### Aiding and abetting

#### Witnessing crime

***State v. Mayo***, 443 S.E.2d 236 (1994) (Miller, J.)

See AIDING AND ABETTING Witnessing crime, (p. 22) for discussion of topic.

### Attempted murder

***State v. Mayo***, 443 S.E.2d 236 (1994) (Miller, J.)

Appellant was convicted of second-degree murder, attempted second-degree murder and unlawful wounding. On appeal he objected to State's Instruction 4 on the grounds it unconstitutionally relieved the prosecution of proving an essential element of attempted murder in that it stated use of a weapon likely to cause death raises a presumption that death was intended.

Syl. pt. 4 - "In order to constitute the crime of attempt, two requirements must be met: (1) a specific intent to commit the underlying substantive crime; and (2) an overt act toward the commission of that crime, which falls short of completing the underlying crime." Syllabus Point 2, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 5 - "In a criminal prosecution, it is constitutional error to give an instruction which supplies by presumption any material element of the crime charged." Syllabus, *State v. O'Connell*, 163 W.Va. 366, 256 S.E.2d 429 (1979).

Syl. pt. 6 - "The plain error doctrine contained in Rule 30 and Rule 52(b) of the West Virginia Rules of Criminal Procedure is identical. It enables this Court to take notice of error, including instructional error occurring during the proceedings, even though such error was not brought to the attention of the trial court. However, the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result." Syllabus Point 4, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988).

## HOMICIDE

### Attempted murder (continued)

***State v. Mayo***, (continued)

Syl. pt. 7 - " 'Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt.' Syllabus point 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975)." Syllabus Point 5, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

The Court noted that the specific language that "a man is presumed to have intended the immediate direct and necessary consequences of his voluntary act" was deemed unconstitutional in *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); adopted in West Virginia in *State v. O'Connell*, 163 W.Va. 366, 256 S.E.2d 429 (1979).

Despite defense trial counsel's failure to object, the Court found plain error that was not harmless. Reversed and remanded.

### Corpus delicti

#### Proof of

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

Appellant was convicted of first-degree murder. On appeal he claimed that because the prosecution failed to show corpus delicti his motion for acquittal was wrongly denied.

Syl. pt. 4 - "To prove the *corpus delicti* in a case of homicide two facts must be established: (1) The death of a human being and (2) a criminal agency as its cause." Syl. pt. 4, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983).

Syl. pt. 5 - The corpus delicti may not be established solely with an accused's extrajudicial confession or admission. The confession or admission must be corroborated in a material and substantial manner by independent evidence. The corroborating evidence need not of itself be conclusive but, rater, is sufficient if, when taken in connection with the confession or admission, the crime is established beyond a reasonable doubt.

**HOMICIDE**

**Corpus delicti** (continued)

**Proof of** (continued)

***State v. Garrett***, (continued)

Syl. pt. 6 - " ' "Upon motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt." *State v. West*, 153 W.Va. 325, 168 S.E.2d 716 (1969).' Syl. pt. 1, *State v. Fischer*, 158 W.Va. 72, 211 S.E.2d 666 (1974)." Syl. pt. 10, *State v. Davis*, 176 W.Va. 454, 345 S.E.2d 549 (1986).

The Court found that skeletal remains were identified as the victim. The Medical Examiner, Dr. Sopher, testified that the general physical description of the victim and the skeleton were similar in height, weight and age. Further, clothing and jewelry found on and near the skeleton were similar to those worn by the victim. Finally, the remains had two missing lower teeth, just like the victim.

By circumstantial evidence and presumption, the state established that the cause of death was by criminal agency. One witness testified that appellant admitted to the killing. Even though an admission alone is insufficient to convict, the Court found sufficient corroborating evidence here. No error.

**Felony-murder**

**Sufficiency of indictment**

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

See HOMICIDE Indictment, Sufficiency of, (p. 336) for discussion of topic.

## HOMICIDE

### First-degree murder

#### Diminished capacity

***State v. Bush***, 442 S.E.2d 437 (1994) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Psychological/psychiatric examination, Waiver during, (p. 606) for discussion of topic.

#### Principal in second-degree

***State v. Jones***, 456 S.E.2d 459 (1995) (Cleckley, J.)

See SELF-INCRIMINATION Statements by defendant, (p. 594) for discussion of topic.

***State v. Mullins***, 456 S.E.2d 42 (1995) (Fox, J.)

See AIDING AND ABETTING Principal in first and second-degree defined, (p. 20) for discussion of topic.

#### Sufficiency of evidence

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See HOMICIDE Sufficiency of evidence, (p. 342) for discussion of topic.

***State v. Kirkland***, 447 S.E.2d 278 (1994) (Workman, J.)

See SUFFICIENCY OF EVIDENCE Generally, (p. 663) for discussion of topic.

## HOMICIDE

### Indictment

#### Sufficiency of

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

Appellant was convicted of first-degree murder. The first count of the indictment charged that appellant "did feloniously, willfully, maliciously, deliberately and unlawfully slay, kill and murder" the victim. Appellant claimed on appeal that no evidence was adduced to show her intent to kill. The second count of the indictment charged aggravated robbery.

Syl. pt. 2 - "An indictment which charges that the defendant feloniously, wilfully, maliciously, deliberately, premeditatedly and unlawfully did slay, kill and murder is sufficient to support a conviction for murder committed in the commission of, or attempt to commit arson, rape, robbery or burglary, it not being necessary, under *W.Va. Code*, 61-2-1, to set forth the manner or means by which the death of the deceased was caused." Syllabus point 5, *State v. Bragg*, 160 W.Va. 455, 235 S.E.2d 466 (1977).

Noting that West Virginia does not recognize indictments for first or second-degree murder, the Court found appellant was convicted of felony-murder. The indictment here conformed with *W.Va. Code*, 61-2-1; and that form is sufficient for felony murder. The means of death need not be specified. *State v. Young*, 173 W.Va. 1, 311 S.E.2d 118 (1983); *Bragg*, *supra*. No error.

### Instructions

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

Appellant was convicted of first-degree murder. The instructions given correctly stated the current law on first-degree murder. Appellant asked that the court define willful, deliberate and premeditated; he claimed he was denied due process because the instructions given equated the above terms with mere intent to kill.

**Instructions** (continued)

***State v. Guthrie***, (continued)

Syl. pt. 4 - A trial court's instructions to the jury must be a correct statement of the law and supported by the evidence. Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not mislead by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. A trial court, therefore, has broad discretion in formulating its charge to the jury, so long as the charge accurately reflects the law. Deference is given to a trial court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed only for an abuse of discretion.

Syl. pt. 5 - Although premeditation and deliberation are not measured by any particular period of time, there must be some period between the formation of the intent to kill and the actual killing, which indicates the killing is by prior calculation and design. This means there must be an opportunity for some reflection on the intention to kill after it is formed.

Syl. pt. 6 - In a criminal cases where the State seeks a conviction of first-degree murder based on premeditation and deliberation, a trial court should instruct the jury that murder in the first-degree consists of an intentional, deliberate, and premeditated killing which means that the killing is done after a period of time for prior consideration. The duration of that period of time for prior consideration. The duration of that period cannot be arbitrarily fixed. The time in which to form a deliberate and premediated design varies as the minds and temperaments of people differ and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for first-degree murder. To the extent that *State v. Schrader*, 172 W.Va. 1, 302 S.E.2d 70 (1982), is inconsistent with our holding today, it is expressly overruled.

**Instructions** (continued)

***State v. Guthrie***, (continued)

The Court determined the proper standard of review should be an abuse of discretion standard. The trial court gave a *Clifford* instruction defining willful and premeditated; and two *Schrader* instructions stating that intent need only exist for an instant and that willful, deliberate and premeditated means the killing is intentional. *State v. Clifford*, 59 W.Va. 1, 52 S.E. 981 (1906); *State v. Schrader*, 172 W.Va. 1, 302 S.E.2d 70 (1982). The Court noted that these instructions failed to distinguish between first and second-degree murder and wrongfully equated premeditation with intent.

*State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982) distinguished between murder and one and two in that murder one must be calculated instead of spontaneous. The Court noted that many jurisdictions have abandoned this distinction, choosing to rely on other criteria; the Court frowned on the current law in that it allows the jury too much discretion. While reluctantly stopping short of redefining the offense of murder, the Court overruled *Schrader*.

Premeditation and deliberation should be defined so as to allow for some time between the formation of the intent to kill and the killing itself. See *Bullock v. United States*, 74 App.D.C. 220, 122 F.2d 213 (1941), *cert. denied*, 317 U.S. 627, 63 S.Ct. 39, 87 L.Ed. 507 (1942). In rejecting *Schrader* the Court held the evidence must show the defendant "considered and weighed his decision to kill." All other intentional killing is second-degree murder. (See Note 7, *Hatfield*, *supra*, for approved new definition of first-degree murder.)

**Malice**

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See HOMICIDE Sufficiency of evidence, (p. 342) for discussion of topic.

**HOMICIDE**

**Instructions** (continued)

**Premeditation**

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See HOMICIDE Instructions, (p. 336) for discussion of topic.

**Shifting burden of proof**

***State v. Richards***, 466 S.E.2d 395 (1995) (Per Curiam)

See PLAIN ERROR Generally, (p. 503) for discussion of topic.

**Intent**

**Voluntary intoxication**

***State v. Bush***, 442 S.E.2d 437 (1994) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Psychological/psychiatric examination, Waiver during, (p. 606) for discussion of topic.

**Intoxication**

**Effect on intent**

***State v. Bush***, 442 S.E.2d 437 (1994) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Psychological/psychiatric examination, Waiver during, (p. 606) for discussion of topic.

**HOMICIDE**

**Kidnaping incidental to**

***State v. Farmer***, 445 S.E.2d 759 (1994) (Per Curiam)

See KIDNAPING Incidental to another offense, (p. 452) for discussion of topic.

**Malice**

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See HOMICIDE Sufficiency of evidence, (p. 342) for discussion of topic.

**Inferred from actions**

***State v. Mullins***, 456 S.E.2d 42 (1995) (Fox, J.)

See AIDING AND ABETTING Principal in first and second-degree defined, (p. 20) for discussion of topic.

**Inferred from deadly weapon**

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See HOMICIDE Sufficiency of evidence, (p. 342) for discussion of topic.

**Malice and premeditation**

***State v. Bush***, 442 S.E.2d 437 (1994) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Psychological/psychiatric examination, Waiver during, (p. 606) for discussion of topic.

## HOMICIDE

### Negligent

#### Sufficiency of evidence

***State v. Linkous***, 460 S.E.2d 288 (1995) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Negligent homicide, (p. 668) for discussion of topic.

### Principal in second-degree

***State v. Jones***, 456 S.E.2d 459 (1995) (Cleckley, J.)

See SELF-INCRIMINATION Statements by defendant, (p. 594) for discussion of topic.

***State v. Mullins***, 456 S.E.2d 42 (1995) (Fox, J.)

See AIDING AND ABETTING Principal in first and second-degree defined, (p. 20) for discussion of topic.

### Self-defense

***State v. McClanahan***, 454 S.E.2d 115 (1994) (Per Curiam)

See SELF-DEFENSE Burden of proof, Prosecution's after prima facie, (p. 593) for discussion of topic.

### Sentencing

#### Duty to instruct on mercy

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See SENTENCING Murder, Duty to instruct on mercy, (p. 630) for discussion of topic.

## HOMICIDE

### Sufficiency of evidence

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See APPEAL Sufficiency of evidence, Generally, (p. 39) for discussion of topic.

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

Appellant was convicted of first-degree murder without mercy. The Court allowed a prosecution instruction that malice, intent and premeditation may be inferred from the act of shooting the victim, regardless of appellant's specific feelings towards the victim; malice toward the victim himself need not exist. Appellant's chief defense was that the shooting was accidental, that he was impaired by alcohol and marijuana and intended merely to scare the victim; a defense witness testified that appellant said to him shortly after the shooting that appellant did not intend to kill the victim.

Syl. pt. 2 - "Where there has been an unlawful homicide by shooting and the State produces evidence that the homicide was a result of malice or a specific intent to kill and was deliberate and premeditated, this is sufficient to support a conviction for first-degree murder." Syllabus Point 3, *State v. Hatfield*, 169 W.Va. 191, 286 S.E.2d 402 (1982).

Syl. pt. 3 - "Where a defendant is the victim of an unprovoked assault and in a sudden heat of passion uses a deadly weapon and kills the aggressor, he cannot be found guilty of murder where there is no proof of malice except the use of a deadly weapon." Syllabus Point 2, *State v. Kirtley*, 162 W.Va. 249, 252 S.E.2d 374 (1978).

Syl. pt. 4 - An instruction in a first-degree murder case that informs the jury that malice need not be shown on the part of the defendant against the deceased is erroneous.

**HOMICIDE**

**Sufficiency of evidence** (continued)

***State v. Jenkins***, (continued)

Syl. pt. 5 - " 'In a homicide trial, malice and intent may be inferred by the jury from the defendant's use of a deadly weapon, under circumstances which the jury does not believe afforded the defendant excuse, justification or provocation for his conduct. Whether premeditation and deliberation may likewise be inferred, depends upon the circumstances of the case.' Point 2, Syllabus, *State v. Bowles*, 117 W.Va. 217, 185 S.E. 205 (1936)." Syllabus, *State v. Johnson*, 142 W.Va. 284, 95 S.E.2d 409 (1956).

Syl. pt. 6 - It is erroneous in a first-degree murder case to instruct the jury that if the defendant killed the deceased with the use of a deadly weapon, then intent, malice, willfulness, deliberation, and premeditation may be inferred from that fact, where there is evidence that the defendant's actions were based on some legal excuse, justification, or provocation. To the extent that the instruction in *State v. Louk*, 171 W.Va. 639, 643, 301 S.E.2d 596, 600 (1983), is contrary to these principles, it is disapproved.

Syl. pt. 7 - "In a criminal prosecution, the State is required to prove beyond a reasonable doubt every material element of the crime with which the defendant is charged, and it is error for the court to instruct the jury in such a manner as to require it to accept a presumption as proof beyond a reasonable doubt of any material element of the crime with which the defendant is charged or as requiring the defendant to introduce evidence to rebut the presumption or to carry the burden of proving the contrary." Syllabus Point 4, *State v. Pendry*, 159 W.Va. 738, 227 S.E.2d 210 (1976), *overruled on other grounds*, *Jones v. Warden, West Virginia Penitentiary*, 161 W.Va. 168, 241 S.E.2d 914, *cert denied*, *Warden of West Virginia Penitentiary v. Jones*, 439 U.S. 830, 99 S.Ct. 107, 58 L.Ed.2d 125 (1978).

Syl. pt. 8 - An instruction which informs the jury that it may find the defendant guilty of first-degree murder if it finds that he used a deadly weapon to kill the deceased unconstitutionally shifts the burden of proof.

Syl. pt. 9 - "Failure to observe a constitutional right constitutes reversible error unless it can be shown that the error was harmless beyond a reasonable doubt." Syllabus Point 5, *State ex rel. Grob v. Blair*, 158 W.Va. 647, 214 S.E.2d 330 (1975).

**Sufficiency of evidence** (continued)

***State v. Jenkins***, (continued)

The Court noted that malice is often confused with intent to kill. Malice toward the victim, as well as a generalized *malo animo*, is required. Prior cases allowing an inference of malice or intent also instructed the jury that if the defendant had a justification, that excuse could reduce the charge. No similar limiting element was given here. Provocation, self-defense, voluntary intoxication and insanity can all reduce the severity of the crime or excuse it altogether.

Here, there was evidence of accidental shooting, as well as defendant's intoxication; even though instructions were given on these elements, Instruction 3 allowed the jury to infer malice and intent from use of a deadly weapon and also said malice was not necessary toward the victim. Further, the instruction allowed the jury to find the defendant guilty merely on the finding of the use of a deadly weapon. This unconstitutionally shifts the burden of proof. Reversed and remanded.

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

Appellant was convicted of first-degree murder and sentenced to life with mercy. One of appellant's co-conspirators clearly implicated appellant, testifying that she solicited him to take a baseball bat and knock out the victim. After he did so, appellant searched the victim's pockets.

Appellant's other co-conspirator testified that appellant and the first man planned to rob the victim. He claimed that during the assault appellant did not cry out or attempt to help the victim in any way. After the attack the three left the scene together in appellant's car. The evidence showed the car had in it a baseball bat, large amounts of money and a receipt belonging to one of the co-conspirators.

**HOMICIDE**

**Sufficiency of evidence** (continued)

***State v. Justice***, (continued)

Syl. pt. 1 - In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

The Court found the evidence here sufficient to convince impartial minds of appellant's guilt. No error.

**Malice**

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See HOMICIDE Sufficiency of evidence, (p. 342) for discussion of topic.

## IDENTIFICATION

### In court

#### Admissibility

***State v. Day***, 447 S.E.2d 576 (1994) (Per Curiam)

Appellant was convicted of third offense shoplifting. He complained that the circuit court erred in admitting an identification based on a photographic array in which appellant's picture was off-center or "slipped to the left." The prosecution claimed in an *in camera* hearing that the photographs had merely slipped while being carried; appellant's was not off-center when viewed. The circuit court noted all were black persons, all had mustaches and all were dressed similarly.

Witnesses testified they had watched appellant take the cigarettes in question, had talked to him when he entered the store, and had seen him in the store at least three times before the incident. A video tape showed appellant taking the cigarettes.

Syl. pt. 1 - "In determining whether an out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification a court must look to the totality of the circumstances and determine whether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Syllabus Point 3, *State v. Casdorph*, 159 W.Va. 909, 230 S.E.2d 476 (1976).

Viewing the totality of the circumstances, the Court found no error. The Court found testimony sufficient to establish a proper chain of custody with respect to videotapes of the store.

***State v. Franklin***, 448 S.E.2d 158 (1994) (Per Curiam)

Appellant was convicted of aggravated robbery. The first photographic array shown to witnesses consisted of photographs of five black males; appellant's photograph was not included. No one identified any of the subjects. Photographs were shown to each witness in turn, without any information as to whether a potential suspect was included.

The second array of seven pictures was prepared using appellant's picture, along with a picture from the first array. This array was shown to several witnesses within a week of the robbery and then shown to others ten months later (just before trial), thirteen witnesses in all. Five of the witnesses were able to identify appellant.

Two months after the robbery a third array was prepared of seven photographs, including one of appellant. Of eight witnesses shown the pictures, three identified appellant. The trial court found the pretrial identification procedures to be suggestive, in that more than one array containing appellant's photograph was shown to several witnesses. Thus, a witness selecting appellant in an earlier array would be more likely to select him later. The court excluded the pretrial identifications but permitted testimony and in-court identifications, in that eyewitness statements were given before viewing of the arrays.

Syl. pt. 1 - " ' "In determining whether an out-of-court identification of a defendant is so tainted as to require suppression of an in-court identification a court must look to the totality of the circumstances and determine whether the identification was reliable, even though the confrontation procedure was suggestive, with due regard given to such factors as the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." Syl. pt. 3, *State v. Casdorph*, 159 W.Va. 909, 230 S.E.2d 476 (1976).' Syllabus Point 2, *State v. Gravely*, 171 W.Va. 428, 299 S.E.2d 375 (1982)." Syl., *State v. Williams*, 181 W.Va. 150, 381 S.E.2d 265 (1989).

**IDENTIFICATION**

**In court** (continued)

**Admissibility** (continued)

***State v. Franklin***, (continued)

Syl. pt. 2 - " 'The action of a trial court in admitting or excluding evidence in the exercise of its discretion will not be disturbed by the appellate court unless it appears that such action amounts to an abuse of discretion.' Syllabus Point 10, *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955)." Syl. pt. 4, *State v. Ashcraft*, 172 W.Va. 640, 309 S.E.2d 600 (1983).

The Court found that an independent basis for identification was established in that each witness had a clear view of appellant during the robbery and give consistent descriptions of him. Similarly, no error in refusing to allow appellant to introduce evidence of the inability of two witnesses to identify appellant from the photographs (this would have opened the door to further state evidence regarding pretrial identification.)

**Out of court**

**Admissibility in court**

***State v. Day***, 447 S.E.2d 576 (1994) (Per Curiam)

See IDENTIFICATION In court, Admissibility, (p. 346) for discussion of topic.

## IMMUNITY

### Spousal testimony

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Marital communications, (p. 239) for discussion of topic.

***State v. Jarrell***, 442 S.E.2d 223 (1994) (Brotherton, J.)

Appellant was convicted of first-degree murder in the death of appellant's sister's husband. Appellant's sister was also convicted of murder.

The prosecution's theory was that appellant's sister had long considered the murder and enlisted appellant in the act. Several witnesses testified as to conversations with her in which she discussed killing her husband.

At trial appellant's wife's testimony to the grand jury was read. Appellant claimed violation of spousal immunity. *W.Va. Code*, 57-3-3.

Syl. pt. 1 - West Virginia Code § 57-3-3 (1966) prohibits adverse testimony from a witness-spouse against another, absent consent, in a criminal trial.

The Court note the statute prohibits "even the calling of the spouse as a witness." *State v. Evans*, 170 W.Va. 3, 287 S.E.2d 922 (1982). In addition *W.Va. Code*, 57-3-4 says "[n]either husband nor wife shall, without the consent of the other, be examined in any case as to any confidential communication made by one to the other while married, nor shall either be permitted, without such consent, to reveal in testimony after the marriage relation ceases any such communication made while the marriage existed."

Here, the spouse did not provide adverse testimony against the appellant, nor betray any privileged marital communications. Her testimony went to the role of appellant's sister; she mentioned appellant only once, and then only to note appellant's presence at the sister's home the night of the murder. The Court noted that grand jury testimony should not be read into evidence where a spouse has invoked privilege; here however, no reason exists for excluding the testimony. No error.

## IMMUNITY

**Spousal testimony** (continued)

***State v. Malick***, 457 S.E.2d 482 (1995) (Per Curiam)

Appellant was convicted of sexual assault. He complained that his wife's testimony should have been excluded.

The Court noted *W.Va. Code*, 57-3-3 specifically excludes immunity from spousal testimony when prosecution for an offense against the child of either spouse. The Court dismissed appellant's argument that an exception should be made since the victim was his stepchild; the child was appellant's wife's biological child and therefore clearly within the statute. No error.

**Subsequent prosecution**

**Use of testimony**

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See EVIDENCE Admissibility, Immunized witness' testimony, (p. 238) for discussion of topic.

## IMPEACHMENT

### Collateral crimes

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See EVIDENCE Impeachment, Criminal conviction, (p. 279) for discussion of topic.

### Preservation of error

***State v. Honaker***, 454 S.E.2d 96 (1994) (Cleckley, J.)

Appellant was convicted of first-degree murder and conspiracy to commit murder in the death of her stepson. Appellant made pre-trial motions to exclude evidence of arson of her neighbor's house, her rape by the victim and paternity of her child by the victim, which motions were granted.

However, at trial the prosecution introduced appellant's statements made to police and hospital personnel, which referred to the excluded evidence. Appellant asked to explain the statements, which explanation would have allowed into court the previously excluded evidence (and thereby open it to rebuttal). Although the trial court offered to reverse the prior exclusionary rulings, appellant's explanation was never given.

Appellant argued on appeal that her inability to explain the statements prejudiced her right to a fair trial.

Syl. pt. 5 - To raise and preserve for appellate review the claim of improper impeachment of the defendant or improper rebuttal by the use of prejudicial collateral evidence, a defendant must testify or the rebuttal evidence must be introduced at trial.

The Court noted that no error appeared on the record. Defense counsel made a strategic choice and did not allow evidence to be introduced to which objection could be made. See *Porter v. Ferguson*, 174 W.Va. 253, 324 S.E.2d 397 (1984); also *Luce v. United States*, 469 U.S. 38, 105 S.Ct. 460, 83 L.Ed.2d 443 (1984).

## INDICTMENT

### Amendments to

***State v. Adams***, 456 S.E.2d 4 (1995) (Cleckley, J.)

See INDICTMENT Sufficiency of, Amendment by grand jury, (p. 356) for discussion of topic.

### Attestation by prosecuting attorney not required

***State ex rel. R.L. v. Bedell***, 452 S.E.2d 893 (1994) (Neely, J.)

Petitioner sought writ of prohibition against further prosecution as a result of the indictment against him having been presented without the attestation of the prosecuting attorney. The indictment was sought by a private citizen who alleged that R.L. sexually assaulted here some 17 years previously when she was five years old. The indictment was attested to by the grand jury foreperson and certified by the Clerk of the Circuit Court.

Syl. pt. 1 - "By application to the circuit judge, whose duty is insure access to the grand jury, any person may go to the grand jury to present a complaint to it. *W.Va.Const.* art. 3, § 17." Syllabus Point 1, *State ex rel. Miller v. Smith*, 168 W.Va. 745, 285 S.E.2d 500 (1981).

Syl. pt. 2 - In cases where a grand jury returns an indictment based on a citizen's complaint and presentation, the attestation of the prosecuting attorney to the grand jury foreperson's signature is not required and the lack of such attestation, standing alone, is insufficient grounds for dismissal of an otherwise authentic indictment. The attestation requirement of *W.Va. Code*, 62-9-1 [1931] does not apply in cases where the prosecuting attorney did not present the complaint to the grand jury. To the extent that our holding in this case contradicts our holdings in *State v. Davis*, 178 W.Va. 87, 357 S.E.2d 769 (1987), *State v. Huffman*, 141 W.Va. 55, 87 S.E.2d 541 (1955), *State v. DeBoard*, 119 W.Va. 396, 194 S.E. 349 (1937), and *State v. Burnette*, 118 W.Va. 501, 190 S.E. 905 (1937), they are overruled.

**INDICTMENT**

**Attestation by prosecuting attorney not required** (continued)

***State ex rel. R.L. v. Bedell***, (continued)

The complainant here was interviewed by a therapist who confirmed that her symptoms were consistent with abuse; her description of the abuse has remained consistent. Because the prosecuting attorney was not yet ready to present evidence to the grand jury, the complainant herself appeared, resulting in this indictment. The prosecuting attorney subsequently moved to recuse his office from the case and a special prosecutor was appointed.

The Court found the procedural safeguard of requiring the prosecuting attorney's signature was insufficient to "trump" a citizen's constitutional right to go before the grand jury and present a complaint. Writ denied.

**Attestation to**

**Prosecuting attorney's signature**

***State ex rel. R.L. v. Bedell***, 452 S.E.2d 893 (1994) (Neely, J.)

See INDICTMENT Attestation by prosecuting attorney not required, (p. 352) for discussion of topic.

**Dismissal of**

**Failure to prosecute**

***State ex rel. Modie v. Hill***, 443 S.E.2d 257 (1994) (McHugh, J.)

Petitioner sought writ of prohibition to prevent his prosecution in two separate matters because more than 180 days had elapsed from the time trial was requested and the date set for trial.

***State ex rel. Modie v. Hill***, (continued)

Petitioner was convicted of aggravated burglary 18 November 1992 in Ohio and began serving his sentence 27 November 1992. Petitioner was then indicted in Wood County; 3 June 1993 the prosecuting attorney asked for a detainer. Petitioner was advised of his rights and requested a final disposition of all Wood County charges on 15 June 1993. The request was received by the Wood County Circuit Clerk 18 June 1993.

Petitioner was moved from one Ohio correctional facility to another. The prosecution's first request of the original facility for temporary custody was returned and a second request made 28 September 1993 to the proper facility. 4 October 1993 the Ohio authorities asked for additional paper work. 15 December 1993 petitioner was finally returned to Wood County; 11 January 1994 petitioner filed motion to dismiss. 13 January 1994 petitioner's motion was denied, on the ground petitioner did not give notice of his transfer to a different facility.

Syl. pt. - The failure of the State to bring the accused to trial within 180 days following the State's receipt of the petitioner's notice of imprisonment and request for final disposition of the case, pursuant to the Agreement on Detainers, *W.Va. Code*, 62-14-1, article III(a) and article V(c) [1971], mandates the dismissal of the indictments pending against the petitioner, where there was no motion for continuance made by the State and the delay was not reasonable or necessary.

The Court noted that under the Interstate Agreement on Detainers the 180 day time period begins to run when the receiving state gets proper documentation, here on 18 June 1993. The Court found no duty on the defendant's part to notify authorities of his change of incarceration. Although dismissal is not automatic, the Court found the prosecution knew of defendant's location within the 180 day limit and took no action, not even a request for continuance. Writ granted.

## INDICTMENT

**Dismissal of** (continued)

**Inadequate discovery**

***State ex rel. Rusen v. Hill***, 454 S.E.2d 427 (1994) (Cleckley, J.)

See DISCOVERY Sanctions, Dismissal of indictment, (p. 179) for discussion of topic.

**Felony-murder**

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

See HOMICIDE Indictment, Sufficiency of, (p. 336) for discussion of topic.

**Joinder of offenses**

***State v. D.E.G. Sr.***, 460 S.E.2d 657 (1995) (Per Curiam)

Appellant was convicted of first-degree sexual assault, using "minors in filming sexually explicit conduct," and sexual abuse. He claimed error on appeal in that he pled guilty to sexual abuse and was then prosecuted on sexual assault and filming, all arising from the same transactions. After the plea was entered, an indictment issued on the other charges. The trial court refused to allow withdrawal of the plea and allowed prosecution on the other charges.

Syl. pt. 1 - "A defendant shall be charged in the same indictment, in a separate count for each offense, if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are two or more acts or transactions connected together or constituting parts of a common scheme or plan." Syllabus point 1, *State ex rel. Watson v. Ferguson*, 166 W.Va. 337, 274 S.E.2d 440 (1980).

Syl. pt. 2 - "A guilty plea based on competent advice of counsel represents a serious admission of factual guilt, and where an adequate record is made to show it was voluntarily and intelligently entered, it will not be set aside." Syllabus point 3, *State ex rel. Burton v. Whyte*, 163 W.Va. 276, 256 S.E.2d 424 (1979).

**INDICTMENT**

**Joinder of offenses** (continued)

***State v. D.E.G. Sr.***, (continued)

The prosecution claimed joinder was not mandatory because it had no knowledge of the offenses contained in the indictment at the time the plea agreement was entered; it also claimed different elements (penetration and filming) were present in the indicted offenses.

The Court found the prosecution was clearly put on notice of the indicted offenses at a preliminary hearing. The plea, however, appeared to have been knowingly and intelligently entered. Reversed in part, affirmed in part.

**Magistrate**

**Suspension of without pay**

***In the Matter of Atkinson***, 456 S.E.2d 202 (1995) (Per Curiam)

See MAGISTRATE COURT Discipline, Indictment for crime, (p. 463) for discussion of topic.

**Murder**

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See INSTRUCTIONS Murder, (p. 387) for discussion of topic.

**Sufficiency of**

**Amendment by grand jury**

***State v. Adams***, 456 S.E.2d 4 (1995) (Cleckley, J.)

Appellant was convicted of concealing and transferring stolen property. After the grand jury returned an indictment, the circuit court permitted amendment to correctly identify the owner of the goods stolen.

**INDICTMENT**

**Sufficiency of** (continued)

**Amendment by grand jury** (continued)

***State v. Adams***, (continued)

Syl. pt. 1 - A defendant has a right under the Grand Jury Clause of Section 4 of Article III of the *West Virginia Constitution* to be tried only on felony offenses for which a grand jury has returned an indictment.

Syl. pt. 2 - To the extent that *State v. McGraw*, 140 W.Va. 547, 85 S.E.2d 849 (1955), stands for the proposition that "any" change to an indictment, whether it be form or substance, requires resubmission to the grand jury for its approval, it is hereby expressly modified. An indictment may be amended by the circuit court, provided the amendment is not substantial, is sufficiently definite and certain, does not take the defendant by surprise, and any evidence the defendant had before the amendment is equally available after the amendment.

Syl. pt. 3 - Any substantial amendment, direct or indirect, of an indictment must be resubmitted to the grand jury. An "amendment of form" which does not require resubmission of an indictment to the grand jury occurs when the defendant is not misled in any sense, is not subjected to any added burden of proof, and is not otherwise prejudiced.

The Court noted pretrial amendment need not raise notice and double jeopardy problems. Different facts than here presented may, however, be a problem. The Court noted with approval the standard in Rule 7(e) of the Rules of Criminal Procedure (relating to amendment of informations), cautioning that no new offense can be added.

**Felony-murder**

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

See HOMICIDE Indictment, Sufficiency of, (p. 336) for discussion of topic.

**INDICTMENT**

**Sufficiency of** (continued)

**Generally**

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See INSTRUCTIONS Murder, (p. 387) for discussion of topic.

**Grand juror disqualified**

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

Appellant was convicted of first-degree murder. Although he objected on appeal to the prosecution's improper influence on the grand jury, his only assignment of error was the disqualification of a grand juror who became a witness.

Syl. pt. 9 - "Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived." Syl. pt. 6, *Addair v. Bryant*, 168 W.Va. 306, 284 S.E.2d 374 (1981).

Syl. pt. 10 - "Under the provisions of *W.Va. Code*, 52-2-12, an indictment will not be quashed or abated on the ground that one member of the grand jury is disqualified." Syl. pt. 4, *State v. Bailey*, 159 W.Va. 167, 220 S.E.2d 432 (1975).

The Court found the allegation of the prosecution's influence to have been waived. As to the alleged undue influence the Court found disqualification of a subsequent witness is insufficient to quash an indictment. No error.

**Murder**

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

See HOMICIDE Indictment, Sufficiency of, (p. 336) for discussion of topic.

**INDICTMENT**

**Sufficiency of** (continued)

**Murder** (continued)

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See INSTRUCTIONS Murder, (p. 387) for discussion of topic.

**Prosecuting attorney's signature**

***State ex rel. R.L. v. Bedell***, 452 S.E.2d 893 (1994) (Neely, J.)

See INDICTMENT Attestation by prosecuting attorney not required, (p. 352) for discussion of topic.

**Sexual abuse**

***Ronnie R. v. Trent***, 460 S.E.2d 499 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 367) for discussion of topic.

**Sexual assault**

***Ronnie R. v. Trent***, 460 S.E.2d 499 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 367) for discussion of topic.

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

Appellant was convicted of second-degree sexual abuse. The indictment left blanks for the date of the two incidents, as follows: "the ___day of ____, 1990" and "the ____day of ____1991."

**INDICTMENT**

**Sufficiency of** (continued)

**Sexual assault** (continued)

***State v. Miller***, (continued)

Appellant claimed specific prejudice in that he was unable to formulate an alibi defense. The victim was unable to say whether the assaults took place in 1990 or 1991, only that the first was in late August and the second in the Fall.

The Court found immaterial variances may be ignored, absent prejudice. *State v. Scarberry*, 187 W.Va. 251, 418 S.E.2d 361 (1992) (variance in owner's name required reversal). *State v. Crowder* held that a variance which misleads the defendant is material.

Here, the indictment gave appellant "fair notice." *State v. Adams*, 456 S.E.2d at 7, n. 3. Time not being an element of the offense, no error occurred. *State v. Chaffin*, 156 W.Va. 264, 192 S.E.2d 728 (1972).

**Use of immunized witness' statements**

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See EVIDENCE Admissibility, Immunized witness' testimony, (p. 238) for discussion of topic.

**INDIGENTS**

**Right to experts**

***State ex rel. Rojas v. Wilkes***, 455 S.E.2d 575 (1995) (Fox, J.)

See EXPERTS  Indigents right to, (p. 296, 297) for discussion of topic.

## INEFFECTIVE ASSISTANCE

### Adequacy of investigation

***State ex rel. Daniel v. Legursky***, 465 S.E.2d 416 (1995) (Cleckley, J.)

Appellant was convicted of first-degree murder and sentenced to life with mercy; and malicious wounding and sentenced three to ten, sentences to run consecutively. His convictions were affirmed. *State v. Daniel*, 182 W.Va. 643, 391 S.E.2d 90 (1990). He claimed ineffective assistance on this appeal of his denial for writ of habeas corpus.

One of the jurors was contacted by a defense witness who offered a good deal on a used car if the juror helped petitioner. Trial counsel reported the incident to the court but did not investigate. The trial court interviewed the juror and determined no harm occurred; no record was made. During the habeas hearing below the juror testified that the witness contacted her twice *and* had contacted another juror, which she did not disclose at trial.

Trial counsel also failed to develop a theory of the case which was sufficient to base a defense on diminished capacity despite appellant's history of DUI, treatment for alcohol abuse and obvious intoxication the night of the killing. Counsel did not even submit a diminished capacity jury instruction; an instruction was apparently prepared and then withdrawn. At the hearing below trial counsel claimed appellant had rejected diminished capacity. The prosecution claimed it had rebuttal testimony from an emergency room treating physician.

Appellant also alleged that counsel did not effectively cross examine a witness. Instead of focusing on the witness' prior criminal record, appellant claimed counsel should have focused on the witness' statements that no argument ensued between appellant and the victim prior to the killing.

Finally, appellant claimed that counsel erred in failing to call a material witness who was present prior to the killing. Theoretically, this witness could have contradicted testimony which established premeditation.

**Adequacy of investigation** (continued)

***State ex rel. Daniel v. Legursky***, (continued)

Syl. pt. 1 - "In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 2 - "In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." Syl. Pt. 6, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 3 - The fulcrum for any ineffective assistance of counsel claim is the adequacy of counsel's investigation. Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel's strategic decision are made after an adequate investigation.

Syl. pt. 4 - In determining whether counsel's conduct falls within the broad range of professionally acceptable conduct, this Court will not view counsel's conduct through the lens of hindsight. Courts are to avoid the use of hindsight to elevate a possible mistake into a deficiency of constitutional proportion. Rather, under the rule of contemporary assessment, an attorney's actions must be examined according to what was known and reasonable at the time the attorney made his or her choices.

**INEFFECTIVE ASSISTANCE**

**Adequacy of investigation** (continued)

***State ex rel. Daniel v. Legursky***, (continued)

Syl. pt. 5 - In deciding ineffective assistance claims, a court need not address both prongs of the conjunctive standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995), but may dispose of such claim based solely on a petitioner's failure to meet either prong of the test.

Syl. pt. 6 - A defendant can only obtain reversal on ineffective assistance of counsel grounds if the error complained of occurred at a critical stage in the adversary proceedings. This is true because Section 17 of Article III of the *West Virginia Constitution* and the Sixth Amendment to the *United States Constitution* guarantee the right to counsel only at critical stages.

The Court noted its review was *de novo* regarding legal conclusions, including the ultimate conclusion of ineffective assistance. The trial court's findings of fact were treated more deferentially.

The error complained of, to be reversible per se, must occur at a critical stage. The jury's decision must be affected. *State v. Watson*, 164 W.Va. 642, 264 S.E.2d 628 (1980). Sentencing, as well as appeal, have been deemed sufficiently critical as to invoke the right to counsel. *Carter v. Bordenkircher*, 159 W.Va. 717, 226 S.E.2d 711 (1976); *Teague v. Scott*, 60 F.3d 1167 (5th Cir. 1995).

(The Court noted that premeditation and deliberation were not clearly shown here but nonetheless that it could not substitute its view for that of the jury.)

Counsel's failure to investigate the possible jury tampering or to request a hearing on the record was clear error but not at a critical stage; and the Court found the error did not prejudice appellant sufficiently to find a "reasonable probability" that the outcome would have been different had the error not occurred. Prejudice is not presumed.

**INEFFECTIVE ASSISTANCE**

**Adequacy of investigation** (continued)

***State ex rel. Daniel v. Legursky***, (continued)

The Court found the decision on diminished capacity to be less clear; counsel was not clearly ineffective here. As to the lack of cross-examination, the Court found counsel's actions were neither unreasonable nor inadequate. The Court found the missing witness was very difficult to locate; indeed no one knew her name prior to the habeas hearing below. Not clearly ineffective. Affirmed.

**Counsel interrogating own client**

***State ex rel. Bess v. Legursky***, 465 S.E.2d 892 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 371) for discussion of topic.

**Critical stages**

***State ex rel. Daniel v. Legursky***, 465 S.E.2d 416 (1995) (Cleckley, J.)

See INEFFECTIVE ASSISTANCE Adequacy of investigation, (p. 362) for discussion of topic.

**Habeas corpus**

**Development on**

***State ex rel. Bess v. Legursky***, 465 S.E.2d 892 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 371) for discussion of topic.

**INEFFECTIVE ASSISTANCE**

**Habeas corpus** (continued)

**Development on** (continued)

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

Appellant was convicted of first-degree murder. He claimed he was denied effective assistance of counsel in that counsel failed to pursue a request for a forensic pathologist (APPOINTED COUNSEL Denial of expert, (p. 43), this Digest); failed to introduce opinions that found no evidence of gunshots on the victim's clothes; failed to make timely objections to the Medical Examiner's opinions; failed to object to parts of another witness' hearsay testimony claiming appellant confessed to the killing; failed to object to a malice instruction; and failed to object to admission of photographs, videotapes and inflammatory comments during closing argument.

Syl. pt. 11 - "It is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal. The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a habeas corpus proceeding before the lower court, and may then appeal if such relief is denied. This Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim." Syl. pt. 10, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992).

The Court found that some of the alleged ineffectiveness was not error (see other references to this case, this Digest); further, that the record was inadequate. The Court suggested habeas corpus relief. No error.

**Inadequate record for**

***State v. Woods***, 460 S.E.2d 65 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard of proof, (p. 376) for discussion of topic.

## INEFFECTIVE ASSISTANCE

### Standard for determining

***Ronnie R. v. Trent***, 460 S.E.2d 499 (1995) (Per Curiam)

Appellant was convicted of first and second-degree sexual assault and child sexual abuse. He filed post-trial motions alleging trial counsel failed to use favorable evidence and DHHR investigations showing the child was not abused were withheld by the prosecution. The prosecution denied that any exculpatory evidence existed.

Further, he alleged trial counsel should have introduced medical records showing he had a sexually transmitted disease at the time of the assault, and that the victim did not. In addition, appellant alleged that the state's medical expert should have been challenged concerning his credentials.

Finally, appellant claimed counsel should have introduced evidence of an alleged DHHR interview of the victim; that trial counsel should have sought a "prompt complaint" instruction advising the jury that the victim's testimony is to be viewed with caution where a complaint is not made promptly after the alleged assault; that trial counsel failed to call character witnesses; that witnesses were inadequately prepared; and that trial counsel should have objected to the indictment's lack of specificity.

The petition also alleged the Public Defender's office was underfunded and lacked investigatory help. The trial court ruled funding did not affect representation in this case, that the office did not have an excessive case load and did not inadequately prepare for this case. Finally, appellant complained his sentence was excessive.

Syl. pt. 1 - "In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

**INEFFECTIVE ASSISTANCE**

**Standard for determining** (continued)

***Ronnie R. v. Trent***, (continued)

Syl. pt. 2 - "In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue". Syl. Pt. 6, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 3 - "One who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, must prove the allegation by a preponderance of the evidence." Syl. Pt. 22, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

Syl. pt. 4 - ' " 'An indictment [or information] for a statutory offense is sufficient if, in charging the offense, it substantially follows the language of the statute, fully informs the accused of the particular offense with which he is charged and enables the court to determine the statute on which the charge is based.' Syl. pt. 3, *State v. Hall*, 172 W.Va. 138, 304 S.E.2d 43 (1983)." Syl. pt. 3, *State v. Wade*, 174 W.Va. 381, 327 S.E.2d 142 (1985).' Syl. Pt. 3, *State v. Donald S.B.*, 184 W.Va. 187, 399 S.E.2d at 898 (1990).

Syl. pt. 5 - " 'Sentences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review.' Syl. pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982)." Syl. Pt. 2, *State v. Farmer*, 193 W.Va. 84, 454 S.E.2d 378 (1994).

The Court noted that uncorroborated testimony by a victim must be accompanied by a cautionary instruction that such testimony should be carefully scrutinized. *State v. Perry*, 41 W.Va. 641, 24 S.E. 634 (1896). Failure to give such an instruction is usually reversible error. *State v. Payne*, 167 W.Va. 252, 280 S.E.2d 72 (1981).

**INEFFECTIVE ASSISTANCE**

**Standard for determining** (continued)

***Ronnie R. v. Trent***, (continued)

However, in *Payne*, it was the attacker's identity that was at issue, whereas here appellant's identity was never in question; in addition appellant actually testified, where Payne did not. Even *Payne* recognized the instruction need not be given every time. *Id.*, 167 W.Va. at 263, 280 S.E.2d at 79. Failure to give the instruction was harmless error here. The outcome was not clearly affected.

As to sexually transmitted disease, appellant testified that he had an STD but his medical records showed he had been treated for possible STD and that further tests showed no evidence of the STD. Appellant had no access to the victim during this time. As to the state's medical expert, the Court noted no evidence was offered on appeal to show the state's expert was incompetent; the testimony was actually favorable to appellant.

The Court disposed of other allegations summarily: the alleged DHHR interview was uncorroborated and therefore it was not error to pursue this matter; there is no rule in West Virginia requiring a "prompt complaint" instruction; additional witnesses could not have testified as to appellant's character under Rule 608(a) because they were only acquainted with appellant's work history; and trial counsel had spoken with witnesses but avoided specific rehearsal in order to avoid appearing staged.

Although unexplained, the indictment was apparently flawed in omitting a date; the Court found the omission harmless since the date was not part of the essence of the offense. *State v. Hensler*, 187 W.Va. 81, 415 S.E.2d 885 (1992). Appellant's sentence was not excessive since it was within statutory limits. No prejudice because of lack of Public Defender resources. Affirmed.

**INEFFECTIVE ASSISTANCE**

**Standard for determining** (continued)

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

Appellant was convicted of sexual assault. Following denial of his writ of habeas corpus at the circuit court, he appealed, claiming, among other matters, ineffective assistance of counsel in allowing the victim to testify without objection to her competence. Counsel had made a pretrial motion for a psychiatric competency evaluation but did not renew his objection at trial. It was undisputed that the victim was mentally retarded and had a behavior disorder.

Appellant's counsel, Michael Froble, testified that he did not challenge the victim's competency because the victim's testimony showed her inability to separate reality from fantasy. She testified that a soap opera character had fathered her child and that the character had been in the room with her the night appellant allegedly assaulted her. She further testified that she had never seen appellant and did not know his name; she had hallucinations and heard power saws and a "choo-choo train."

Further, appellant contended his trial counsel was ineffective in entering into a stipulation with the prosecution concerning negative state police lab results from vaginal swabs taken the morning after the attack. Froble contended testimony from a police lab witness would not have been helpful. The stipulation was read to the jury.

Finally, appellant complained that failure to call the doctor who performed the morning-after examination prejudiced his case because the doctor had exculpatory evidence. The doctor testified at the habeas hearing that he would not have been able to determine whether the victim had been assaulted; his examination notes indicated "mucous-like secretion present in the vagina. Dry, caked secretions present right side of vaginal outlet."

Syl. pt. 5 - "In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

**INEFFECTIVE ASSISTANCE**

**Standard for determining** (continued)

***State ex rel. Azeez v. Mangum***, (continued)

Syl. pt. 6 - "In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue. Syl. Pt. 6, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

The Court found counsel had considered the strategic consequences of his decisions and found all of his actions were within the range of competent assistance. Even if error were present, it would not have changed the outcome. No error.

***State ex rel. Bess v. Legursky***, 465 S.E.2d 892 (1995) (Per Curiam)

Appellant was convicted of daytime burglary and first-degree murder and sentenced to life without mercy. Upon appellant's arrest he was not immediately arraigned but was taken to the Kanawha County Jail following an hour's delay at the police station. While in the bathroom at the jail following fingerprinting, a police officer confronted him with the evidence against him and with his parents' plea not to let their son get killed. Appellant cried and admitted the killing; he was advised of his rights, signed a wavier and gave a complete tape recorded confession.

Appellant later told his appointed attorney that he had committed the burglary but not the killing. In the presence of police counsel questioned appellant regarding the truth of the confession. (Appellant later testified at the suppression hearing and at trial that he thought the police officer was holding a gun at his back when he confessed and that the police officer threatened to kill him.)

**INEFFECTIVE ASSISTANCE**

**Standard for determining** (continued)

***State ex rel. Bess v. Legursky***, (continued)

Counsel later accompanied appellant to the murder scene and encouraged him to cooperate with police; no formal plea agreement had yet been made. Appellant gave a second taped confession during this trip. The trial court admitted both confessions to evidence.

A prior appeal affirmed their admissibility but reserved the right to rule later on ineffective assistance. *State v. Bess*, 185 W.Va. 290, 406 S.E.2d 721 (1991). The lower court denied habeas corpus relief on 1 July 1994. Appellant argued the confessions were coerced, his trial counsel was ineffective and that the evidence was insufficient to convict.

Syl. pt. 1 - "In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 446 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. Pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 2 - "In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have aced, under the circumstances, as defense counsel acted in the case at issue." Syl. Pt. 6, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 3 - "One who charges on appeal that his trial counsel was ineffective and that such resulted in his conviction, must prove the allegation by a preponderance of the evidence." Syl. Pt. 22, *State v. Thomas*, 157 W.Va 640, 203 S.E.2d 445 (1974).

**INEFFECTIVE ASSISTANCE**

**Standard for determining** (continued)

***State ex rel. Bess v. Legursky***, (continued)

Syl. pt. 4 - "The fulcrum of any ineffective assistance of counsel claim is the adequacy of counsel's investigation. Although there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, and judicial scrutiny of counsel's performance must be highly deferential, counsel must at a minimum conduct a reasonable investigation enabling him or her to make informed decisions about how best to represent criminal clients. Thus, the presumption is simply inappropriate if counsel's strategic decision are made after an adequate investigation." Syl. Pt. 3, *State ex rel Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (1995).

Syl. pt. 5 - "A defendant can only obtain reversal on ineffective assistance of counsel grounds if the error complained of occurred at a critical stage in the adversary proceedings. This is true because Section 14 of Article III of the *West Virginia Constitution* and the Sixth Amendment to the *United States Constitution* guarantee the right to counsel only at critical stages." Syl. Pt. 6, *State ex rel Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (1995).

Syl. pt. 6 - "In deciding ineffective assistance claims, a court need not address both prongs of the conjunctive standard of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995), but may dispose of such claim based solely on a petitioner's failure to meet either prong of the test." Syl. Pt. 5, *State ex rel Daniel v. Legursky*, 195 W.Va. 314, 465 S.E.2d 416 (1995).

The Court found trial counsel's performance constitutionally inadequate at critical stages of the investigation, even resulting in the second taped confession which otherwise might not have occurred. At trial he essentially testified in favor of the prosecution and failed to pursue exculpatory evidence; incredibly, he submitted no jury instructions and failed to communicate effectively with his client throughout his representation. The Court commented that appellant would have been better off without counsel.

The Court was also sharply critical of habeas counsel's failure to speak with his client and to investigate the underlying facts relating to the tape recorded confession. Reversed and remanded.

**INEFFECTIVE ASSISTANCE**

**Standard for determining** (continued)

***State ex rel. Daniel v. Legursky***, 465 S.E.2d 416 (1995) (Cleckley, J.)

See INEFFECTIVE ASSISTANCE Adequacy of investigation, (p. 362) for discussion of topic.

***State v. Miller***, 459 S.E.2d 114 (1995) (Cleckley, J.)

Appellant was convicted of battery involving an incident at Colin Anderson Center wherein she allegedly struck a male patient. On appeal she alleged ineffective assistance of counsel.

Syl. pt. 5 - In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984): (1) Counsel's performance was deficient under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different.

Syl. pt. 6 - In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue.

The Court noted review of an ineffective assistance claim is usually impossible on direct appeal; trial counsel cannot be heard as to his reasons for his actions or inaction. Counsel's conduct must be so egregious that there is a "reasonable probability" that the outcome would have been different absent the errors.

Here, counsel offered no instructions on self-defense despite relying on the defense; further, counsel failed to object to instructions given by the court or submitted by the prosecution. However, the Court declined to rule, leaving open the possibility of further collateral attack upon a fully-developed record.

**INEFFECTIVE ASSISTANCE**

**Standard for determining** (continued)

***State v. Wood***, 460 S.E.2d 771 (1995) (McHugh, C.J.)

Appellant was convicted of sexual assault and incest. He claimed on appeal that he was denied effective assistance of counsel in that his trial counsel: (1) failed to call character witnesses or any other witness than appellant; (2) failed to object to damaging testimony that the victim was being truthful; (3) failed to call an expert to suggest that appellant was unlikely to commit the crimes; (4) failed to ask for a cautionary instruction regarding a witness' testimony; (5) failed to ask that the victim undergo psychological testing; (6) failed to offer a jury instruction stating the victim's testimony should be carefully scrutinized; and (7) failed to offer evidence of mitigating circumstances at sentencing.

Syl. pt. 5 - "In the West Virginia courts, claims of ineffective assistance of counsel are to be governed by the two-pronged test established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); (1) Counsel's performance was deficient, under an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." Syl. pt. 5, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 6 - "In reviewing counsel's performance, courts must apply an objective standard and determine whether, in light of all the circumstances, the identified acts or omissions were outside the broad range of professionally competent assistance while at the same time refraining from engaging in hindsight or second-guessing of trial counsel's strategic decisions. Thus, a reviewing court asks whether a reasonable lawyer would have acted, under the circumstances, as defense counsel acted in the case at issue." Syl. pt. 6, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

The Court noted that ineffective assistance claims are seldom heard on direct appeal because the key witness, the trial attorney, has not had the opportunity to explain his or her actions. See *Miller*, *supra*. No consideration of claim.

## INEFFECTIVE ASSISTANCE

### Standard of proof

***State v. Woods***, 460 S.E.2d 65 (1995) (Per Curiam)

Appellant was convicted of aggravated robbery. On appeal he claimed his trial counsel conducted an inadequate *voir dire* and failed to object during the prosecution's closing argument.

Syl. pt. 4 - "It is the extremely rare case when this Court will find ineffective assistance of counsel when such a charge is raised as an assignment of error on a direct appeal. The prudent defense counsel first develops the record regarding ineffective assistance of counsel in a habeas corpus proceeding before the lower court, and may then appeal if such relief is denied. This Court may then have a fully developed record on this issue upon which to more thoroughly review an ineffective assistance of counsel claim." Syl. pt. 10, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992).

The Court found the issues to be more appropriately raised in a habeas corpus proceeding. *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992). The record here was incomplete. No error.

## INSANITY

### Burden of proof

***State v. Walls***, 445 S.E.2d 515 (1994) (Per Curiam)

See INSANITY Presumptions, (p. 377) for discussion of topic.

### Presumptions

***State v. Walls***, 445 S.E.2d 515 (1994) (Per Curiam)

Appellant was convicted of first-degree murder without mercy and of malicious assault for the murder of his stepfather and the wounding of his mother. During the unprovoked attack, appellant ranted about the stepfather killing his son (which was not true) and otherwise acted in a wild, frenzied manner while beating his stepfather to death with a hammer. The following day upon his apprehension following a high-speed chase, appellant responded appropriately to the arresting officer. The issue is whether the state proved appellant's sanity beyond a reasonable doubt.

Appellant was diagnosed as paranoid schizophrenic and as a drug and alcohol abuser by a Ph.D. psychologist defense expert witness. A psychiatrist agreed with the diagnosis and said appellant was not criminally responsible. A court-appointed psychologist who made the initial examination first testified appellant was not responsible but later deferred his judgment until a reevaluation six months hence; the reevaluation never took place.

A second psychiatrist saw appellant at an out-patient clinic and advised him to continue taking anti-psychotic and anti-depressant medication. A general practitioner who saw appellant the day before the murder diagnosed him as depressed and psychotic.

The state relied on the latter two doctors' opinions, along with the testimony of appellant's sister, that of a next-door neighbor and the arresting officer.

Syl. pt. 1 - " 'To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.' Syl. Pt. 1, in part, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978)." Syllabus Point 1, *State v. Triplett*, 187 W.Va. 760, 421 S.E.2d 511 (1992).

**INSANITY**

**Presumptions** (continued)

***State v. Walls***, (continued)

Syl. pt. 2 - "There exists in the trial of an accused a presumption of sanity. However should the accused offer evidence that he was insane, the presumption of sanity disappears and the burden is on the prosecution to prove beyond a reasonable doubt that the defendant was sane at the time of the offense." Syllabus Point 2, *State v. Milam*, 163 W.Va. 752, 260 S.E.2d 295 (1979).

Syl. pt. 3 - "When lay witnesses testify about a person's mental condition, the following factors are to be considered: (1) the witnesses' acquaintance with the person and opportunity to observe the person's behavior; (2) the time during which the observation occurred; and (3) the nature of the behavior observed." Syllabus Point 7, *State v. McWilliams*, 177 W.Va. 369, 352 S.E.2d 120 (1986).

The Court emphasized that the second psychiatrist had seen appellant on several occasions over a two-year period. She determined appellant was not schizophrenic, the basis for the other experts' finding of no responsibility. Coupled with the lay testimony, this showing was held sufficient. No error.

**Tests for**

**Judge's duty to order**

***State v. Moore***, 457 S.E.2d 801 (1995) (Neely, J.)

See JUDGES Duties, To ascertain competency, (p. 411) for discussion of topic.

**Witnesses**

**Lay persons**

***State v. Walls***, 445 S.E.2d 515 (1994) (Per Curiam)

See INSANITY Presumptions, (p. 377) for discussion of topic.

## INSTRUCTIONS

### Accomplices

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

Appellant was convicted of first-degree murder in a bludgeoning murder committed pursuant to a robbery. There was some suggestion that one of the two main prosecution witnesses may have committed the crime; their own testimony and circumstantial evidence would have placed both near the crime scene during the evening of the murder.

Appellant claimed error in that instructions regarding accomplices were given although neither he nor his co-defendant testified, nor was anyone else charged. The Court noted that an accomplice is defined as "one who is in some way concerned or associated in commission of crime. . ." Here, the witnesses admitted driving appellant and his codefendant to the crime scene. No error.

### Attempt

***State v. Mayo***, 443 S.E.2d 236 (1994) (Miller, J.)

See HOMICIDE Attempted murder, (p. 332) for discussion of topic.

### Attempted murder

***State v. Mayo***, 443 S.E.2d 236 (1994) (Miller, J.)

See HOMICIDE Attempted murder, (p. 332) for discussion of topic.

### Circumstantial evidence

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See APPEAL Sufficiency of evidence, Generally, (p. 39) for discussion of topic.

## INSTRUCTIONS

### Co-defendant's testimony following plea

***State v. Farmer***, 445 S.E.2d 759 (1994) (Per Curiam)

See WITNESSES Co-defendant, (p. 709) for discussion of topic.

### Collateral crimes

***State v. McGinnis***, 455 S.E.2d 516 (1994) (Cleckley, J.)

See EVIDENCE Admissibility, Collateral crimes, (p. 218) for discussion of topic.

### Curative

#### Effect of

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

Appellant was convicted of murder. During pre-trial, he attempted to introduce the testimony of Joseph Franklin, a serial killer, who told a Wisconsin investigator that he had killed the victims here. Franklin repeated these statements to Federal ATF agents and to West Virginia State Police. He also drew a detailed map. The trial court refused to admit the statements or the map, ruling lack of trustworthiness under Rule 804(b)(3).

Syl. pt. 3 - " 'Ordinarily where objections to questions or evidence by a party are sustained by the trial court during the trial and the jury instructed not to consider such matter, it will not constitute reversible error.' Syl. pt. 18, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966)." Syl. Pt. 1, *State v. Acord*, 175 W.Va. 611, 336 S.E.2d 741 (1985).

The Court noted that admission or refusal to admit evidence is reviewable only for abuse of discretion. Because Franklin at first failed to cooperate with authorities, then denied involvement, the court was justified in not admitting the statements, despite the detailed map of the murder scene. The jury was allowed to hear from a state policeman that Franklin said he committed the murders, that he gave conflicting statements and that he currently refused to talk. No error here.

## INSTRUCTIONS

### Duty to instruct on mercy in first-degree murder case

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See SENTENCING Murder, Duty to instruct on mercy, (p. 630) for discussion of topic.

### Elements of crime

#### Presumption forbidden

***State v. Mayo***, 443 S.E.2d 236 (1994) (Miller, J.)

See HOMICIDE Attempted murder, (p. 332) for discussion of topic.

### Failure to give

***State v. Derr***, 451 S.E.2d 731 (1994) (Cleckley, J.)

See INSTRUCTIONS Right to, (p. 389) for discussion of topic.

***State v. Richards***, 466 S.E.2d 395 (1995) (Per Curiam)

See PLAIN ERROR Generally, (p. 503) for discussion of topic.

### Failure to object

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

Appellant was convicted of first-degree murder. He objected on appeal to the giving of an instruction on malice. Trial counsel, however, did not object the instruction.

**Failure to object** (continued)

***State v. Garrett***, (continued)

Syl. pt. 8 - "The general rule is that a party may not assign as error the giving of an instruction unless he objects, stating distinctly the matters to which he objects and the grounds of his objection." Syl. pt. 3, *State v. Gangwer*, 169 W.Va. 177, 286 S.E.2d 389 (1982).

Syl. pt. 9 - "Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived." Syl. pt. 6, *Addair v. Bryant*, 168 W.Va. 306, 284 S.E.2d 374 (1981).

The Court refused to consider this assignment of error.

***State v. Miller***, 459 S.E.2d 114 (1995) (Cleckley, J.)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 374) for discussion of topic.

**Failure to offer**

***State v. Miller***, 459 S.E.2d 114 (1995) (Cleckley, J.)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 374) for discussion of topic.

***State v. Miller***, 459 S.E.2d 114 (1995) (Cleckley, J.)

Appellant objected on appeal to the judge's general charge to the jury. No objection was made at trial, nor alternative instructions offered. Counsel even stated he was satisfied with the instructions offered.

Syl. pt. 7 - To trigger application of the "plain error" doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings.

**Failure to offer** (continued)

***State v. Miller***, (continued)

Syl. pt. 8 - Under the "plain error" doctrine, "waiver" of error must be distinguished from "forfeiture" of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right--the failure to make timely assertion of the right--does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is "plain." To be "plain," the error must be "clear" or "obvious."

Syl. pt. 9 - Assuming that an error is "plain," the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice.

The Court found failure to give self-defense instructions did not rise to the level of plain error. Even more importantly, the Court found the record inadequate and that appellant waived any right to have the jury instructed on self-defense. No error.

**Felony-murder**

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See INSTRUCTIONS Accomplices, (p. 379) for discussion of topic.

## INSTRUCTIONS

### First-degree murder

#### Malice

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See HOMICIDE Sufficiency of evidence, (p. 342) for discussion of topic.

### Homicide

#### Premeditation

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See HOMICIDE Instructions, (p. 336) for discussion of topic.

#### Shifting burden of proof

***State v. Richards***, 466 S.E.2d 395 (1995) (Per Curiam)

See PLAIN ERROR Generally, (p. 503) for discussion of topic.

### Hung jury

#### Effect of

***State v. McClanahan***, 454 S.E.2d 115 (1994) (Per Curiam)

Appellant was convicted of unlawful wounding. On appeal she claimed the judge improperly instructed the jury that a hung jury was a very rare occurrence and that a hung jury required retrial of the case, thus prejudicing her right to a fair trial.

**INSTRUCTIONS**

**Hung jury** (continued)

**Effect of** (continued)

***State v. McClanahan***, (continued)

The Court noted a similar instruction was approved by the United States Supreme Court in *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154 (1986). However, *State v. Hobbs*, 168 W.Va. 13, 282 S.E.2d 258 (1981) holds that whether improper coercion has occurred is a case by case question. *Hobbs*, *supra*, at 272. See also, *State v. Spence*, 173 W.Va. 184, 313 S.E.2d 461 (1984).

The Court ruled that giving of the instruction should be grounds for reversal only if appellant could show prejudice. Since the instruction was given during pre-trial activities, it was far removed from the time of the jury's deliberations. Further, no showing was made that jurors were hesitant or unsure of their verdict when the jury was polled. No error.

**Intent**

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See INSTRUCTIONS Sufficiency of, Generally, (p. 390) for discussion of topic.

**Lesser included offenses**

***State v. Shane***, 465 S.E.2d 640 (1995) (Per Curiam)

Appellant was convicted of felony welfare fraud pursuant to *W.Va. Code*, 9-5-4. She claimed error in that the trial court did not allow a lesser included instruction on misdemeanor welfare fraud.

Appellant applied for benefits in September, 1986, claiming she had not worked since July, 1986; in September, 1987 and again in January, 1988 she once more filed for benefits. DHHR issued food stamps and welfare benefits. Appellant had actually worked during 1987 and early 1988.

**Lesser included offenses** (continued)

***State v. Shane***, (continued)

Syl. pt. 1 - "The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the grater offense." Syllabus point 1, *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981).

Syl. pt. 2 - "Where there is no evidentiary dispute or insufficiency on the elements of the greater offense which are different from the elements of the lesser included offense, then the defendant is not entitled to a lesser included offense instruction." Syllabus point 2, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

The Court noted *W.Va. Code*, 9-5-4 makes welfare fraud a felony if the amount of benefits received exceeds $500. Here, the evidence showed clearly that appellant had received $1,083 in food stamps, $636 of which was received after she filed her second application for benefits claiming she was still unemployed. Affirmed.

**Malice**

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See INSTRUCTIONS Sufficiency of, Generally, (p. 390) for discussion of topic.

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See HOMICIDE Sufficiency of evidence, (p. 342) for discussion of topic.

## INSTRUCTIONS

### Murder

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See HOMICIDE Sufficiency of evidence, (p. 342) for discussion of topic.

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See INSTRUCTIONS Accomplices, (p. 379) for discussion of topic.

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

Appellant was convicted of first-degree murder in an ax handle beating. The indictment charged him with "feloniously, maliciously, deliberately and unlawfully slaying, killing and murdering one Billy Harper." Appellant claimed on appeal that the indictment was defective for not mentioning that the murder occurred during a robbery; and further, that it was error for the court to give instructions on felony murder based on this indictment.

Syl. pt. 4 - " 'An indictment which charges that the defendant feloniously, wilfully, maliciously, deliberately, premeditatedly and unlawfully did slay, kill and murder is sufficient to support a conviction for murder committed in the commission of, or attempt to commit arson, rape, robbery or burglary, it not being necessary, under *W.Va. Code*, 61-2-1, to set forth the manner or means by which the death of the deceased was caused.' Syllabus Point 5, *State v. Bragg*, 160 W.Va. 455, 235 S.E.2d 466 (1977)." Syl. pt. 10, *State v. Young*, 173 W.Va. 1, 311 S.E.2d 118 (1983).

Syl. pt. 5 - " 'An instruction to the jury is proper if it is a correct statement of the law and if sufficient evidence has been offered at trial to support it.' Syllabus Point 8, *State v. Hall*, 171 W.Va. 212, 298 S.E.2d 246 (1982)." Syl. pt. 1, *State v. White*, 171 W.Va. 658, 301 S.E.2d 615 (1983).

No error.

**INSTRUCTIONS**

**Murder** (continued)

**Premeditation**

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See HOMICIDE Instructions, (p. 336) for discussion of topic.

**Shifting burden of proof**

***State v. Richards***, 466 S.E.2d 395 (1995) (Per Curiam)

See PLAIN ERROR Generally, (p. 503) for discussion of topic.

**Premeditation**

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See HOMICIDE Instructions, (p. 336) for discussion of topic.

**Presumption of malice**

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See HOMICIDE Sufficiency of evidence, (p. 342) for discussion of topic.

**Reasonable doubt**

**Circumstantial evidence**

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See APPEAL Sufficiency of evidence, Generally, (p. 39) for discussion of topic.

## INSTRUCTIONS

### Refusal to give

***State v. Linkous***, 460 S.E.2d 288 (1995) (Per Curiam)

See INSTRUCTIONS Sufficiency of, Generally, (p. 391) for discussion of topic.

### Right to

***State v. Derr***, 451 S.E.2d 731 (1994) (Cleckley, J.)

Appellant was convicted of first-degree murder, malicious assault and first-degree sexual assault. The trial court refused to give five of appellant's jury instructions.

Syl. pt. 11 - A trial court's refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense.

Syl. pt. 12 - Whether facts are sufficient to justify the delivery of a particular instruction is reviewed by this Court under an abuse of discretion standard. In criminal cases where a conviction results, the evidence and any reasonable inferences are considered in the light most favorable to the prosecution.

Syl. pt. 13 - "Where the testimony of an accomplice is corroborated in material facts which tend to connect the accused with the crime, sufficient to warrant the jury in crediting the truth of the accomplice's testimony, it is not error to refuse a cautionary instruction. This rule applies even though the corroborative evidence falls short of constituting independent evidence which supports the alleged ultimate fact that the accused committed the offense charged." Syllabus Point 3, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980).

The Court found instructions given (including general charges to the jury) adequately covered the points appellant wanted to cover in one instruction; although appellant's instruction would have been more "charitable" to his position, the instructions given were sufficient. Other instructions refused were not supported by the evidence. No error.

## INSTRUCTIONS

### Self-defense

#### Failure to offer

***State v. Miller***, 459 S.E.2d 114 (1995) (Cleckley, J.)

See INSTRUCTIONS Failure to offer, (p. 382) for discussion of topic.

### Sufficiency of

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See HOMICIDE Instructions, (p. 336) for discussion of topic.

### Circumstantial evidence

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See APPEAL Sufficiency of evidence, Generally, (p. 39) for discussion of topic.

### Generally

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

Appellant was convicted of first-degree murder and aggravated robbery. He claimed error in that the following improper instruction was given on malice and intent:

> "The Court instructs the jury that malice and intent may be inferred from the defendant's use of a deadly weapon, under circumstances which you believe do not afford the defendant excuse, justification or provocation for his conduct."

***State v. Bradshaw***, (continued)

> "Where it is shown that the defendant used a deadly weapon in the commission of a homicide, then you may find the existence of malice from the use of such weapon and other surrounding circumstances, unless there are explanatory or mitigating circumstances surrounding the case which you believe affords the defendant excuse, justification or provocation for his conduct. Your are not obliged to find, however, and you may not find the defendant guilty, unless you are satisfied that the State has established the element of malice beyond a reasonable doubt."

Syl. pt. 15 - Jury instructions are reviewed by determining whether the charge, reviewed as a whole, sufficiently instructed the jury so they understood the issues involved and were not misled by the law. A jury instruction cannot be dissected on appeal; instead, the entire instruction is looked at when determining its accuracy. The trial court, therefore, has broad discretion in formulating its charge to the jury, so long as it accurately reflects the law. Deference is given to the circuit court's discretion concerning the specific wording of the instruction, and the precise extent and character of any specific instruction will be reviewed for an abuse of discretion.

The Court noted malice may be inferred "so long as the instruction is qualified by language that informs the jury that this may be done if the evidence does not show that the defendant had an excuse, justification or provocation. *State v. Jenkins*, 191 W.Va. 87, 443 S.E.2d 244 (1994). This instruction complied. Instructions need not include any and all reasonable inferences; inferences are for counsel to argue. No error.

***State v. Linkous***, 460 S.E.2d 288 (1995) (Per Curiam)

Appellant was convicted of negligent homicide. He claimed on appeal that State's Instruction No. 2 caused the jury to apply mere negligence as the standard of proof and refused to give Defendant's Instruction No. 3 and 6.

**INSTRUCTIONS**

**Sufficiency of** (continued)

**Generally** (continued)

***State v. Linkous***, (continued)

Syl. pt. 5 - "An instruction in a criminal case which is not binding and does not require the jury to accept a presumption as proof beyond a reasonable doubt of any essential element of a crime, or require the defendant to introduce evidence to disprove an essential element of the crime for which he is charged, is not erroneous." Syllabus Point 3, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 6 - "A trial court's refusal to give a requested instruction is reversible error only if: (1) the instruction is a correct statement of the law; (2) it is not substantially covered in the charge actually given to the jury; and (3) it concerns an important point in the trial so that the failure to give it seriously impairs a defendant's ability to effectively present a given defense." Syllabus Point 11, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

The instructions clearly required more than simple negligence; further, Defendant's Instruction No. 1 clearly contained the same material as Instructions 3 and 6 (which were not correct statements of the law). No abuse of discretion in refusal. No error.

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See INSTRUCTIONS Murder, (p. 387) for discussion of topic.

**Reasonable doubt**

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See APPEAL Sufficiency of evidence, Generally, (p. 39) for discussion of topic.

**INSTRUCTIONS**

**Testimony by accomplice**

***State v. Derr***, 451 S.E.2d 731 (1994) (Cleckley, J.)

See INSTRUCTIONS  Right to, (p. 389) for discussion of topic.

## INTENT

### Aiding and abetting

#### Inference arising from

***State v. Mullins***, 456 S.E.2d 42 (1995) (Fox, J.)

See AIDING AND ABETTING Principal in first and second-degree defined, (p. 20) for discussion of topic.

### Diminished capacity to form

***State v. Bush***, 442 S.E.2d 437 (1994) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Psychological/psychiatric examination, Waiver during, (p. 606) for discussion of topic.

### Instructions on

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See INSTRUCTIONS Sufficiency of, Generally, (p. 390) for discussion of topic.

### Jury question whether present

***State v. Phalen***, 452 S.E.2d 70 (1994) (McHugh, J.)

See FORGERY Elements of, (p. 310) for discussion of topic.

### Sufficiency of for principal in second-degree

***State v. Mullins***, 456 S.E.2d 42 (1995) (Fox, J.)

See AIDING AND ABETTING Principal in first and second-degree defined, (p. 20) for discussion of topic.

## INTENT

### Voluntary intoxication

***State v. Bush***, 442 S.E.2d 437 (1994) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Psychological/psychiatric examination, Waiver during, (p. 606) for discussion of topic.

### Jury question re: intent

***State v. Phalen***, 452 S.E.2d 70 (1994) (McHugh, J.)

See FORGERY Elements of, (p. 310) for discussion of topic.

## INTERROGATION

### Admissions during

***State v. Hopkins***, 453 S.E.2d 317 (1994) (Neely, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 602) for discussion of topic.

### Custodial

#### Admissibility of confessions

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 597) for discussion of topic.

### Unlawful detention

***State v. Jones***, 456 S.E.2d 459 (1995) (Cleckley, J.)

See SELF-INCRIMINATION Statements by defendant, (p. 594) for discussion of topic.

## INTOXICATION

### Insufficient to negate intent

***State v. Phalen***, 452 S.E.2d 70 (1994) (McHugh, J.)

See FORGERY Elements of, (p. 310) for discussion of topic.

### Voluntariness of confession

#### Effect on

***State v. Moore***, 457 S.E.2d 801 (1995) (Neely, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Voluntariness, Intelligence a factor, (p. 608) for discussion of topic.

## JUDGES

### Abuse of discretion

#### Change of venue

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See VENUE Change of venue, Sufficiency of proof for, (p. 700) for discussion of topic.

#### Competency

***State v. Moore***, 457 S.E.2d 801 (1995) (Neely, J.)

See JUDGES Duties, To ascertain competency, (p. 411) for discussion of topic.

#### Custody in abuse and neglect matters

***In the Interest of Renae Ebony***, 452 S.E.2d 737 (1994) (Workman, J.)

See CHILD CUSTODY Temporary custody, (p. 140) for discussion of topic.

#### Evidence

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See INSTRUCTIONS Curative, Effect of, (p. 380) for discussion of topic.

#### Refusal to strike for cause

***State v. Phillips***, 461 S.E.2d 75 (1995) (Cleckley, J.)

See JURY Bias, Necessity for showing, (p. 423) for discussion of topic.

## JUDGES

### Alcoholism

***In the Matter of Hey***, 457 S.E.2d 509 (1995) (Per Curiam)

See JUDGES Discipline, Sexual harassment, (p. 405) for discussion of topic.

### Communications with jury

***State v. Allen***, 455 S.E.2d 541 (1994) (Cleckley, J.)

See RIGHT TO BE PRESENT All stages of proceedings, (p. 564) for discussion of topic.

### Competency

#### Duty to ascertain

***State v. Moore***, 457 S.E.2d 801 (1995) (Neely, J.)

See JUDGES Duties, To ascertain competency, (p. 411) for discussion of topic.

### Conduct at trial

#### Comments regarding questioning

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 548) for discussion of topic.

## JUDGES

### Continuance

#### Discretion to grant

***Hamilton v. Ravasio***, 451 S.E.2d 749 (1994) (Per Curiam)

See EVIDENCE Admissibility, Hearsay, (p. 232) for discussion of topic.

### Discipline

#### Conduct prior to becoming a judge

***Committee on Legal Ethics v. Karl***, 449 S.E.2d 277 (1994) (McHugh, J.)

See ATTORNEYS Discipline, Neglect, (p. 85) for discussion of topic.

#### *Ex parte* communications

***In the Matter of Starcher***, 457 S.E.2d 147 (1995) (Per Curiam)

An attorney was seated outside respondent's chambers and overheard a telephone conversation in which respondent, discussing a current criminal case, told an assistant prosecuting attorney that the state should have supporters present in the court room during closing argument (police, victims, female attorneys); that the term "serial rapist" should be used frequently; and that the prosecuting attorney should be more emotional. Respondent initiated the phone call.

According to the complainants, the attorney and another member of her firm, respondent expressed "displeasure" at the possibility of a complaint when confronted and hinted at retaliation. Respondent denied threatening the complainants. The Judicial Investigation Commission cited several Canons of the *Code of Judicial Conduct*; the Court focused on respondent's violation of Canon 3B(7).

**JUDGES**

**Discipline** (continued)

***Ex parte* communications** (continued)

***In the Matter of Starcher***, (continued)

Syl. pt. 1 - "The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings." Syl. pt. 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980).

Syl. pt. 2 - "The initiation of *ex parte* communications by a judge is strictly prohibited by Canon 3A(4) of the *Judicial Code of Ethics*, 'except as authorized by law.' " Syl. pt. 2, *In the Matter of Kaufman*, 187 W.Va. 166, 416 S.E.2d 480 (1992).

Syl. pt. 3 - "When the language of a canon under the Judicial Code of Ethics is clear and unambiguous, the plain meaning of the canon is to be accepted and followed without resorting to interpretation or construction." Syl. pt. 1, *In the Matter of Karr*, 182 W.Va. 221, 387 S.E.2d 126 (1989).

The Court found a clear violation of Canon 3B(7) (the *Kaufman* case, *supra*, was decided prior to a Code revision; the intent of the sections is the same). The Court dismissed the alleged threats to the complainants and reprimanded respondent.

**Family law master**

***In the Matter of Means***, 452 S.E.2d 696 (1994) (Miller, J.)

See FAMILY LAW MASTER Discipline, Conflict of interest with litigant, (p. 303) for discussion of topic.

**Generally**

***In the Matter of Hey***, 457 S.E.2d 509 (1995) (Per Curiam)

See JUDGES Discipline, Sexual harassment, (p. 405) for discussion of topic.

**JUDGES**

**Discipline** (continued)

**Intoxicated on the bench**

***In the Matter of Hey***, 457 S.E.2d 509 (1995) (Per Curiam)

See JUDGES Discipline, Sexual harassment, (p. 405) for discussion of topic.

**Right to free speech**

***In the Matter of Hey***, 457 S.E.2d 509 (1995) (Per Curiam)

The Judicial Investigation Commission found probable cause to file a complaint against Judge Hey for violations of Canons 1, 2A and 3A(6) of the *Judicial Code of Ethics* (superseded by the Code of Judicial Conduct). Previously, Judge Hey was publicly censured for appearing on a national television program giving details of a pending case. *In the Matter of Hey*, 188 W.Va. 545, 425 S.E.2d 221 (1992). The day following this Court's decision, Judge Hey appeared on a local radio station talk show discussing his censure and behavior of members of the Hearing Board.

Referring to a member of the Board's viewing a video tape of the television program, Judge Hey said she "didn't even view 15 minutes of it so I'm not done with her yet. I want her to understand that. I hope she or one of her friends are listening." The Board member filed the complaint at issue here. Judge Hey claimed the comments were not intended as a threat and that they were protected under the First Amendment because they were not made in the course of his official duties.

Syl. pt. - "The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings." Syl. pt. 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980).

The Court noted no witnesses could characterize Judge Hey's comments as threatening. Although the Court found no ethical violation, it departed from the usual restraint of deciding cases on the narrowest possible grounds in order to speak to the larger constitutional issue herein.

**JUDGES**

**Discipline** (continued)

**Right to free speech** (continued)

***In the Matter of Hey***, (continued)

Noting the difference between judges and other public employees, even other elected officials (subjecting judges to a higher standard and thus, potentially, more restrictions on speech), the Court nonetheless found the speech here protected. Judge Hey was commenting on a matter which was resolved, which involved him, and in which the forum provided (the ethics hearing) may not have afforded him sufficient public comment to influence public perception or provide the public with knowledge of his conduct. Canon 3(B)(9) even specifically states a judge is not prohibited from "commenting on proceedings in which the judge is a litigant in a personal capacity." Complaint dismissed.

***In the Matter of Hey***, 452 S.E.2d 24 (1994) (Cleckley, J.)

The Judicial Investigation Commission found probable cause to file a complaint against Judge Hey for violations of Canons 1, 2A and 3A(6) of the *Judicial Code of Ethics* (superseded by the Code of Judicial Conduct). Previously, Judge Hey was publicly censured for appearing on a national television program giving details of a pending case. *In the Matter of Hey*, 188 W.Va. 545, 425 S.E.2d 221 (1992). The day following this Court's decision, Judge Hey appeared on a local radio station talk show discussing his censure and behavior of members of the Hearing Board.

Referring to a member of the Board's viewing a video tape of the television program, Judge Hey said she "didn't even view 15 minutes of it so I'm not done with her yet. I want her to understand that. I hope she or one of her friends are listening." The Board member filed the complaint at issue here. Judge Hey claimed the comments were not intended as a threat and that they were protected under the First Amendment because they were not made in the course of his official duties.

**JUDGES**

**Discipline** (continued)

**Right to free speech** (continued)

***In the Matter of Hey***, (continued)

Syl. pt. 1 - "Under Rule III(C)(2) (1983 Supp.) of the *West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates*, the allegations of a complaint in a judicial disciplinary proceeding 'must be proved by clear and convincing evidence.' " Syl. pt. 4, *In re Pauley*, 173 W.Va. 228, 235, 314 S.E.2d 391, 399 (1983).

Syl. pt. 2 - The State may accomplish its legitimate interests and restrain the public expression of its judges through narrowly tailored limitations where those interests outweigh the judges' free speech interests.

Syl. pt. 3 - The State's interests in maintaining and enforcing the judicial canons against judges' speech are sufficiently served by their specific prohibitions so that the general prohibitions in Canons 1, 2, and 3 of the judicial Code of Ethics (and now the Code of Judicial Conduct) may not be used to punish judges for their public remarks that do not concern a pending or impending matter and that do not violate either a specific prohibition or some other law.

Syl. pt. 4 - A judge may not be disciplined consistent with the First Amendment to the *United States Constitution* or with Section 7 of Article III of the *West Virginia Constitution* for his remarks during a radio interview in which he discussed his own disciplinary proceeding, criticized a member of his investigative panel, and stated his intention to take some reactive and lawful measure against the panel member.

The Court noted no witnesses could characterize Judge Hey's comments as threatening. Although the Court found no ethical violation, it departed from the usual restraint of deciding cases on the narrowest possible grounds in order to speak to the larger constitutional issue herein.

**JUDGES**

**Discipline** (continued)

**Right to free speech** (continued)

***In the Matter of Hey***, (continued)

Noting the difference between judges and other public employees, even other elected officials (subjecting judges to a higher standard and thus, potentially, more restrictions on speech), the Court nonetheless found the speech here protected. Judge Hey was commenting on a matter which was resolved, which involved him, and in which the forum provided (the ethics hearing) may not have afforded him sufficient public comment to influence public perception or provide the public with knowledge of his conduct. Canon 3(B)(9) even specifically states a judge is not prohibited from "commenting on proceedings in which the judge is a litigant in a personal capacity." Complaint dismissed.

**Sexual harassment**

***In the Matter of Hey***, 457 S.E.2d 509 (1995) (Per Curiam)

Two judicial ethics charges were filed against respondent, one involving sexual harassment of female courthouse employees and one alleging intoxication on the bench. After the Judicial Investigation Commission entered an agreement with respondent in which he admitted the charges; agreed to resign from practice; agreed to censure for violation of Canons 1, 2 and 3 of the *Judicial Code of Ethics*; and pay a fine of $10,000, plus costs of the ethics proceedings (estimated at $20,000), waiving any appeal regarding excessive of the fine. At the hearing respondent publicly acknowledged his alcoholism and admitted his inappropriate conduct.

The same day the hearing was held respondent was granted disability retirement by Governor Caperton due to his alcoholism, pursuant to *W.Va. Code*, 51-9-8. The Court noted the issue of disability was not raised in this proceeding.

**JUDGES**

**Discipline** (continued)

**Sexual harassment** (continued)

***In the Matter of Hey***, (continued)

Syl. pt. - "The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings." Syl. pt. 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980).

The Court noted, without deciding, that constitutional impediments exist with regard to suspending a circuit judge's disability retirement payments after the Governor grants them. Finding respondent committed the alleged acts, the Court accepted the settlement agreed to by the Judicial Investigation Commission.

**Statements regarding pending case**

***In the Matter of Hey***, 457 S.E.2d 509 (1995) (Per Curiam)

See JUDGES Discipline, Right to free speech, (p. 402) for discussion of topic.

***In the Matter of Hey***, 452 S.E.2d 24 (1994) (Cleckley, J.)

See JUDGES Discipline, Right to free speech, (p. 403) for discussion of topic.

**Suspensions**

***Committee on Legal Ethics v. Karl***, 449 S.E.2d 277 (1994) (McHugh, J.)

See ATTORNEYS Discipline, Neglect, (p. 85) for discussion of topic.

## JUDGES

### Discretion

#### Acceptance of plea bargain

***State ex rel. Brewer v. Starcher***, 465 S.E.2d 185 (1995) (Cleckley, J.)

See PLEA BARGAIN Acceptance of, Rules governing, (p. 506) for discussion of topic.

#### Admissibility of evidence

***State v. Derr***, 451 S.E.2d 731 (1994) (Cleckley, J.)

See EVIDENCE Admissibility, Photographs, (p. 243) for discussion of topic.

***State v. Farley***, 452 S.E.2d 50 (1994) (Cleckley, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 599) for discussion of topic.

***State v. Jenkins***, 466 S.E.2d 471 (1995) (McHugh, C.J.)

See EVIDENCE Admissibility, Authentication of evidence, (p. 212) for discussion of topic.

#### Admission of evidence

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See INSTRUCTIONS Curative, Effect of, (p. 380) for discussion of topic.

**JUDGES**

**Discretion** (continued)

**Change of venue**

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See VENUE Change of venue, Sufficiency of proof for, (p. 700) for discussion of topic.

**Continuances**

***Hamilton v. Ravasio***, 451 S.E.2d 749 (1994) (Per Curiam)

See EVIDENCE Admissibility, Hearsay, (p. 232) for discussion of topic.

**Custody in abuse and neglect matters**

***In the Interest of Renae Ebony***, 452 S.E.2d 737 (1994) (Workman, J.)

See CHILD CUSTODY Temporary custody, (p. 140) for discussion of topic.

**Denial of expert**

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

See APPOINTED COUNSEL Denial of expert witness, (p. 43) for discussion of topic.

**Discovery**

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

See DISCOVERY Failure to comply, When prejudicial, (p. 175) for discussion of topic.

**JUDGES**

**Discretion** (continued)

**Discovery** (continued)

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

See DISCOVERY Failure to disclose, Witnesses, (p. 177) for discussion of topic.

**Extent of *voir dire***

***Michael v. Sabado***, 453 S.E.2d 419 (1994) (Cleckley, J.)

See JURY *Voir dire*, (p. 433) for discussion of topic.

**Gruesome photographs**

***State v. Derr***, 451 S.E.2d 731 (1994) (Cleckley, J.)

See EVIDENCE Admissibility, Photographs, (p. 243) for discussion of topic.

**Home study in abuse and neglect**

***DHHR ex rel. Wright v. David L.***, 453 S.E.2d 646 (1994) (Cleckley, J.)

See EVIDENCE Admissibility, Tape recordings, (p. 260) for discussion of topic.

**Jury misconduct**

***State v. Sutphin***, 466 S.E.2d 402 (1995) (Recht, J.)

See JURY Prejudicing, Jury tampering, (p. 429) for discussion of topic.

**JUDGES**

**Discretion** (continued)

**New trial**

***State v. Sutphin***, 466 S.E.2d 402 (1995) (Recht, J.)

See JURY Prejudicing, Jury tampering, (p. 429) for discussion of topic.

**Sanctions for inadequate discovery**

***State ex rel. Rusen v. Hill***, 454 S.E.2d 427 (1994) (Cleckley, J.)

See DISCOVERY Sanctions, Dismissal of indictment, (p. 179) for discussion of topic.

**Sentencing**

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

See SENTENCING Appeal of, Standard for review, (p. 611) for discussion of topic.

**Venue change**

***State ex rel. Riffle v. Ranson***, 464 S.E.2d 763 (1995) (Cleckley, J.)

See VENUE Change of venue, Authority for, (p. 697) for discussion of topic.

**Disqualification**

**Rule of necessity**

***State ex rel. Brown v. Dietrick***, 444 S.E.2d 47 (1994) (Miller, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 579) for discussion of topic.

## JUDGES

### Duties

#### To ascertain competency

***State v. Moore***, 457 S.E.2d 801 (1995) (Neely, J.)

Appellant was convicted of sexual abuse and burglary. He is thirty-one years old with an eighth grade education and is mildly retarded. After breaking and entering the victim's house, appellant was found outside the home putting on his clothing. He was taken to police headquarters and read his *Miranda* rights; a police officer put a written copy in front of appellant and pointed to each line as he read it aloud. Appellant acknowledged he understood the rights form and signed a waiver.

Appellant proceeded to confess but subsequently refused to give a recorded statement. He claimed that he was intoxicated when he confessed. The police officer did not recall appellant's physical or emotional state and was unaware of appellant's retardation at the time of the questioning. Pursuant to defense motion, appellant was evaluated by one psychologist to determine his competency, despite the prosecution's noting that *W.Va. Code*, 27-6A-1 requires a psychiatric evaluation. Trial counsel did not object.

Following the psychologist's report, the prosecution asked whether a hearing was necessary to determine competency. Defense counsel said "actually we just need to get the Court's ruling."

Syl. pt. 1 - "When a trial judge is made aware of a possible problem with defendant's competency, it is abuse of discretion to deny a motion for psychiatric evaluation. To the extent that *State v. Arnold*, 159 W.Va. 158, 219 S.E.2d 922 (1975), differs from this rule, it is overruled." Syl. pt. 4, *State v. Demastus*, 165 W.Va. 572, 270 S.E.2d 649 (1980).

Syl. pt. 2 - In the interests of future judicial economy, whenever a trial court is confronted with a Motion for Mental Status Evaluation and orders an examination believing that the defendant may be incompetent or insane, the court should order that said examination shall be conducted by "one or more psychiatrists, or a psychologist *and* a psychiatrist: in accordance with *W.Va. Code*, 27-6A-1 [1983]. [Emphasis added.]

**JUDGES**

**Duties** (continued)

**To ascertain competency** (continued)

***State v. Moore***, (continued)

Syl. pt. 3 - "It is the general rule that the intelligence of a person making a confession is but one factor to be considered in determining whether a waiver of rights was voluntary." *State v. Adkins*, 170 W.Va. 46, 53, 289 S.E.2d 720, 727 (1982).

Syl. pt. 4 - "A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syl. Pt. 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

Syl. pt. 5 - " 'Retardation or intoxication at the time of interrogation does not necessarily invalidate a subsequent confession. 'In determining the voluntariness of a confession, the trial court must access the totality of all the surrounding circumstances. No one factor is determinative." *See* Syl. pt. 7, *in part*, *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994).

The Court found no reversible error because defense counsel essentially waived his client's right to an examination by a psychiatrist. (The court also noted defense counsel was "tactically correct as there appears to be no evidence of either incompetency or insanity.")

**To instruct on**

***State v. Derr***, 451 S.E.2d 731 (1994) (Cleckley, J.)

See INSTRUCTIONS Right to, (p. 389) for discussion of topic.

**JUDGES**

**Duties** (continued)

**To rule in timely manner**

***State ex rel. Carey v. Henning***, No. 22568 (12/14/94) (Per Curiam)

Relator petitioned for mandamus contending the circuit court was extraordinarily derelict in ruling on his request for mandamus against the Department of Corrections. Relator was confined 6 August 1993. He had previously suffered a heart attack and had numerous other physical problems.

On 13 December 1993 he petitioned the circuit court for writ of mandamus, claiming Corrections had refused him a physical examination and an appropriate special diet. One of the named respondents filed motion for statement of particulars and the circuit court appointed an attorney to represent the relator. Upon a conflict of interest a second attorney was appointed and on 8 November 1994 notified relator that a list of witnesses was necessary, along with other information; he further suggested that relator was not cooperating.

A Department of Corrections memorandum filed with the circuit court indicates relator has had significant treatment since his incarceration. Relator has been prohibited from working and has been given a low-fat and bland diet.

The Court distinguished this case from *State ex rel. Patterson v. Aldredge*, 173 W.Va. 446, 317 S.E.2d 805 (1984) and *State ex rel. Cackowska v. Knapp*, 147 W.Va. 699, 130 S.E.2d 204 (1963) in that the facts here have not yet been tried and relator's case is active, a number of procedural orders having been issued and the case set for trial. Other adequate remedies are available and no clear legal right has yet been established. *State ex rel. Billy Ray C. v. Skaff*, 190 W.Va. 504, 438 S.E.2d 847 (1993); *Mounts v. Chafin*, 186 W.Va. 156, 411 S.E.2d 481 (1991); *State ex rel. Ruddlesden v. Roberts*, 175 W.Va. 161, 332 S.E.2d 122 (1985). Writ denied.

**JUDGES**

**Duties** (continued)

**To rule in timely manner** (continued)

***State ex rel. Lynch v. MacQueen***, No. 22469 (10/18/94) (Per Curiam)

Relator sought writ of mandamus to compel respondent to rule upon a case filed 10 December 1993. Relator had filed a pro se writ of habeas corpus 1 March 1991; on 5 September 1991 a Public Defender was appointed. The supplemental petition was filed 10 December 1993.

The Court quoted Syllabus Point 2, *State ex rel. Patterson v. Aldredge*, 173 W.Va. 446, 317 S.E.2d 805 (1984), that mandamus will lie to compel a ruling if a trial court "unreasonably neglects or refuses" to rule. Respondent compelled to rule within 30 days. Writ granted.

***State ex rel. Proctor v. Steptoe***, No. 22141 (5/20/94) (Per Curiam)

Relator apparently notified respondent judge on 26 January 1993 that he wished to file for writ of habeas corpus. The court opened a case file and appointed a public defender. Communication broke down and substitute private counsel was appointed in September, 1993. Private counsel apparently did not file a petition prior to relator's petitioning the Court.

Although finding the delay was not the fault of respondent, the Court issued writ of mandamus directing respondent to require counsel to file a formal petition. Within twenty days, hearing to be held forthwith thereafter. The Court suggested that respondent may want to file a complaint against appointed counsel. Writ granted.

**Duty**

**Co-defendant's testimony following plea**

***State v. Farmer***, 445 S.E.2d 759 (1994) (Per Curiam)

See WITNESSES Co-defendant, (p. 709) for discussion of topic.

**JUDGES**

**Duty** (continued)

**To instruct on mercy in first-degree murder case**

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See SENTENCING Murder, Duty to instruct on mercy, (p. 630) for discussion of topic.

**Ethics**

***Committee on Legal Ethics v. Karl***, 449 S.E.2d 277 (1994) (McHugh, J.)

See ATTORNEYS Discipline, Neglect, (p. 85) for discussion of topic.

***In the Matter of Hey***, 457 S.E.2d 509 (1995) (Per Curiam)

See JUDGES Discipline, Right to free speech, (p. 402) for discussion of topic.

***In the Matter of Hey***, 452 S.E.2d 24 (1994) (Cleckley, J.)

See JUDGES Discipline, Right to free speech, (p. 403) for discussion of topic.

***In the Matter of Hey***, 457 S.E.2d 509 (1995) (Per Curiam)

See JUDGES Discipline, Sexual harassment, (p. 405) for discussion of topic.

***In the Matter of Starcher***, 457 S.E.2d 147 (1995) (Per Curiam)

See JUDGES Discipline, *Ex parte* communications, (p. 400) for discussion of topic.

**JUDGES**

**Ethics** (continued)

**Campaign violations**

***In the Matter of Mendez***, 450 S.E.2d 646 (1994) (Per Curiam)

See MAGISTRATE COURT Discipline, Campaign violations, (p. 458) for discussion of topic.

**Failure to find replacement**

***In the Matter of Witherell***, No. 21978 (11/18/94) (Per Curiam)

See MAGISTRATE COURT Discipline, Failure to find replacement, (p. 462) for discussion of topic.

**Family law master**

***In the Matter of Means***, 452 S.E.2d 696 (1994) (Miller, J.)

See FAMILY LAW MASTER Discipline, Conflict of interest with litigant, (p. 303) for discussion of topic.

**Polling place violation**

***In the Matter of Harshbarger***, 450 S.E.2d 667 (1994) (Per Curiam)

See MAGISTRATE COURT Discipline, Election violations, (p. 462) for discussion of topic.

***Ex parte* communications**

***In the Matter of Starcher***, 457 S.E.2d 147 (1995) (Per Curiam)

See JUDGES Discipline, *Ex parte* communications, (p. 400) for discussion of topic.

**JUDGES**

**Extrajudicial statements**

***In the Matter of Hey***, 457 S.E.2d 509 (1995) (Per Curiam)

See JUDGES Discipline, Right to free speech, (p. 402) for discussion of topic.

***In the Matter of Hey***, 452 S.E.2d 24 (1994) (Cleckley, J.)

See JUDGES Discipline, Right to free speech, (p. 403) for discussion of topic.

**Family law master**

**Public reprimand**

***In the Matter of Means***, 452 S.E.2d 696 (1994) (Miller, J.)

See FAMILY LAW MASTER Discipline, Conflict of interest with litigant, (p. 303) for discussion of topic.

**Impartiality**

**Bailiff as witness**

***State v. Kelley***, 451 S.E.2d 425 (1994) (McHugh, J.)

See WITNESSES Bailiff as witness, (p. 707) for discussion of topic.

**Improper comment**

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 548) for discussion of topic.

## JUDGES

### Intoxication

***In the Matter of Hey***, 457 S.E.2d 509 (1995) (Per Curiam)

See JUDGES Discipline, Sexual harassment, (p. 405) for discussion of topic.

### Juvenile matters

#### Plea bargains

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See PROPORTIONALITY Appropriateness of sentence, Juveniles, (p. 540) for discussion of topic.

### Magistrates

#### Duty to find replacement

***In the Matter of Witherell***, No. 21978 (11/18/94) (Per Curiam)

See MAGISTRATE COURT Discipline, Failure to find replacement, (p. 462) for discussion of topic.

#### Ethics

***In the Matter of Browning***, 452 S.E.2d 34 (1994) (Cleckley, J.)

See MAGISTRATE COURT Discipline, Domestic violence, (p. 459) for discussion of topic.

***In the Matter of Harshbarger***, 450 S.E.2d 667 (1994) (Per Curiam)

See MAGISTRATE COURT Discipline, Election violations, (p. 462) for discussion of topic.

**JUDGES**

**Magistrates** (continued)

**Ethics** (continued)

***In the Matter of Mendez***, 450 S.E.2d 646 (1994) (Per Curiam)

See MAGISTRATE COURT Discipline, Campaign violations, (p. 458) for discussion of topic.

**Plea bargain**

**Discretion in approving**

***State ex rel. Brewer v. Starcher***, 465 S.E.2d 185 (1995) (Cleckley, J.)

See PLEA BARGAIN Acceptance of, Rules governing, (p. 506) for discussion of topic.

**Limits on acceptance of**

***State ex rel. Brewer v. Starcher***, 465 S.E.2d 185 (1995) (Cleckley, J.)

See PLEA BARGAIN Acceptance of, Rules governing, (p. 506) for discussion of topic.

**Participation in**

***State ex rel. Brewer v. Starcher***, 465 S.E.2d 185 (1995) (Cleckley, J.)

See PLEA BARGAIN Acceptance of, Rules governing, (p. 506) for discussion of topic.

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See PROPORTIONALITY Appropriateness of sentence, Juveniles, (p. 540) for discussion of topic.

**JUDGES**

**Plea bargain** (continued)

**Participation in forbidden**

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See PROPORTIONALITY Appropriateness of sentence, Juveniles, (p. 540) for discussion of topic.

**Right to free speech**

***In the Matter of Hey***, 457 S.E.2d 509 (1995) (Per Curiam)

See JUDGES Discipline, Right to free speech, (p. 402) for discussion of topic.

***In the Matter of Hey***, 452 S.E.2d 24 (1994) (Cleckley, J.)

See JUDGES Discipline, Right to free speech, (p. 403) for discussion of topic.

**Sentencing**

**Appellate review of**

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

See SENTENCING Appeal of, Standard for review, (p. 611) for discussion of topic.

**Sexual harassment**

***In the Matter of Hey***, 457 S.E.2d 509 (1995) (Per Curiam)

See JUDGES Discipline, Sexual harassment, (p. 405) for discussion of topic.

**JUDGES**

**Suspensions**

***Committee on Legal Ethics v. Karl***, 449 S.E.2d 277 (1994) (McHugh, J.)

See ATTORNEYS Discipline, Neglect, (p. 85) for discussion of topic.

**Venue**

**Discretion for change of**

***State ex rel. Riffle v. Ranson***, 464 S.E.2d 763 (1995) (Cleckley, J.)

See VENUE Change of venue, Authority for, (p. 697) for discussion of topic.

## JUDICIAL NOTICE

### Blood tests

***Mildred L.M. v. John O.F.***, 452 S.E.2d 436 (1994) (Cleckley, J.)

See PATERNITY Blood tests, When conclusive, (p. 492) for discussion of topic.

## JURY

### Bias

#### Bailiff as witness

***State v. Kelley***, 451 S.E.2d 425 (1994) (McHugh, J.)

See WITNESSES Bailiff as witness, (p. 707) for discussion of topic.

#### Generally

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

Appellant was convicted of first-degree murder. On appeal he claimed that a juror was a good friend of four prosecution witnesses, a friend of the victim and the victim's daughter, and knew facts of the case from two people who discovered the body. The juror claimed to be capable of being impartial.

Syl. pt. 9 - " ' "The true test as to whether a juror is qualified to serve on the panel is whether without bias or prejudice he can render a verdict solely on the evidence under the instructions of the court." Syllabus Point 1, *State v. Kilpatrick*, 158 W.Va. 289, 210 S.E.2d 480 (1974).' Syllabus Point 3, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981)." Syl. pt. 7, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

No error.

#### Necessity for showing

***State v. Phillips***, 461 S.E.2d 75 (1995) (Cleckley, J.)

Appellant was convicted of first-degree murder in the death of his wife. During individual *voir dire*, two potential jurors admitted that evidence of adultery might negatively affect their decision. Appellant's request to strike for cause was denied.

**JURY**

**Bias** (continued)

**Necessity for showing** (continued)

***State v. Phillips***, (continued)

Although the jurors were struck using peremptory strikes, appellant claimed his right to an impartial jury was compromised and he was denied his statutory right to six peremptory strikes by being forced to use two of them for what should have been strikes for cause.

Syl. pt. 7 - A trial court's failure to remove a biased juror from a jury panel does not violate a defendant's right to a trial by an impartial jury as guaranteed by the Sixth and Fourteenth Amendments to the *United States Constitution* and by Section 14 of Article III of the *West Virginia Constitution*. In order to succeed in a claim that his or her constitutional right to an impartial jury was violated, a defendant must affirmatively show prejudice.

Syl. pt. 8 - The language of *W.Va. Code*, 62-3-3 (1949), grants a defendant the specific right to reserve his or her peremptory challenges until an unbiased jury panel is assembled. Consequently, if a defendant validly challenges a prospective juror for cause and the trial court fails to remove the juror, reversible error results even if a defendant subsequently uses his peremptory challenge to correct the trial court's error.

The Court noted that, absent a showing of prejudice, forced use of a peremptory challenge does not deny the constitutional right to an impartial jury, even where the juror should have been dismissed for cause. *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). The biased juror has been removed.

Unlike Oklahoma, however, West Virginia does not force use of peremptory challenges to correct errors in refusal to strike for cause. More importantly, denying a valid challenge for cause is reversible error even if the juror is later struck. *State v. Wilcox*, 169 W.Va. 142, 286 S.E.2d 257 (1982). The Court noted that the true test of whether a juror is qualified to serve is whether the juror can be impartial; because this determination is within the judge's discretion, the trial court's decision will not be disturbed absent abuse of discretion. Reversed and remanded.

**JURY**

**Bias** (continued)

**Racial discrimination**

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

See EQUAL PROTECTION Right to jury free of racial discrimination, (p. 201) for discussion of topic.

***State v. Kirkland***, 447 S.E.2d 278 (1994) (Workman, J.)

See EQUAL PROTECTION Right to jury free of racial discrimination, (p. 202) for discussion of topic.

**Right to be free of**

***State v. Derr***, 451 S.E.2d 731 (1994) (Cleckley, J.)

See VENUE Change of venue, Sufficiency of proof for, (p. 698) for discussion of topic.

**Disqualification**

**Generally**

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See JURY Bias, Generally, (p. 423) for discussion of topic.

**Peremptory strike**

***State v. Phillips***, 461 S.E.2d 75 (1995) (Cleckley, J.)

See JURY Bias, Necessity for showing, (p. 423) for discussion of topic.

## JURY

### Expert testimony

#### How to be considered

***Mildred L.M. v. John O.F.***, 452 S.E.2d 436 (1994) (Cleckley, J.)

See PATERNITY Blood tests, When conclusive, (p. 492) for discussion of topic.

### Inquiry by jury

***State v. Allen***, 455 S.E.2d 541 (1994) (Cleckley, J.)

See RIGHT TO BE PRESENT All stages of proceedings, (p. 564) for discussion of topic.

### Instructions

#### General sufficiency

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See INSTRUCTIONS Murder, (p. 387) for discussion of topic.

#### Standard for reviewing

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See HOMICIDE Instructions, (p. 336) for discussion of topic.

**JURY**

**Intent to commit**

**Question for jury**

***State v. Phalen***, 452 S.E.2d 70 (1994) (McHugh, J.)

See FORGERY Elements of, (p. 310) for discussion of topic.

**Judge's communication with**

***State v. Allen***, 455 S.E.2d 541 (1994) (Cleckley, J.)

See RIGHT TO BE PRESENT All stages of proceedings, (p. 564) for discussion of topic.

**Magistrate presiding over**

**Denial of due process**

***State ex rel. Collins v. Bedell***, 460 S.E.2d 636 (1995) (McHugh, C.J.) (consolidated) ***State ex rel. Peeples v. Knight***, 460 S.E.2d 636 (1995) (McHugh, C.J.)

See MAGISTRATE COURT Appeal from, (p. 454) for discussion of topic.

**Misconduct**

***State v. Sutphin***, 466 S.E.2d 402 (1995) (Recht, J.)

See JURY Prejudicing, Jury tampering, (p. 429) for discussion of topic.

**JURY**

**Misconduct** (continued)

**Reference to dictionary**

***State v. Richards***, 466 S.E.2d 395 (1995) (Per Curiam)

Appellant was convicted of second-degree murder. At presentencing motions and during the sentencing hearing, trial counsel alleged a juror improperly sought an independent definition of malice from a dictionary during jury deliberations.

Syl. pt. 3 - "A jury verdict may not ordinarily be impeached based on matters that occur during the jury's deliberative process which matters relate to the manner or means the jury uses to arrive at its verdict." Syllabus point 1, *State v. Scotchel*, 168 W.Va. 545, 285 S.E.2d 384 (1981).

Syl. pt. 4 - "Courts recognize that a jury verdict may be impeached for matters of misconduct extrinsic to the jury's deliberative process." Syllabus point 2, *State v. Scotchel*, 168 W.Va. 545, 285 S.E.2d 384 (1981).

The Court found reference to a dictionary is misconduct and could have been especially harmful in light of the some confusion in the trial court's instructions on malice. However, the Court merely remanded for a hearing on whether the misconduct prejudiced the verdict. Reversed in part and remanded.

**Peremptory strike**

**Use of in lieu of cause**

***State v. Phillips***, 461 S.E.2d 75 (1995) (Cleckley, J.)

See JURY Bias, Necessity for showing, (p. 423) for discussion of topic.

**JURY**

**Prejudice**

**Failure to strike for**

***State v. Phillips***, 461 S.E.2d 75 (1995) (Cleckley, J.)

See JURY Bias, Necessity for showing, (p. 423) for discussion of topic.

**Prejudicing**

**Instruction on hung jury**

***State v. McClanahan***, 454 S.E.2d 115 (1994) (Per Curiam)

See INSTRUCTIONS Hung jury, Effect of, (p. 384) for discussion of topic.

**Juror offered discount on car**

***State ex rel. Daniel v. Legursky***, 465 S.E.2d 416 (1995) (Cleckley, J.)

See INEFFECTIVE ASSISTANCE Adequacy of investigation, (p. 362) for discussion of topic.

**Jury tampering**

***State v. Sutphin***, 466 S.E.2d 402 (1995) (Recht, J.)

Appellant was convicted of second-degree murder. During the course of the trial, a juror visited a witness without invitation. The witness, appellant's cousin, testified that shortly after the victim's death, the witness' wife discovered a bullet shell at appellant's trailer (the site of the killing).

Following the testimony two jurors informed the judge they had known the witness for a number of years. Neither was excused. One of them then made the visit, apparently to inform the witness that the juror did not know the witness was to be called and to assure himself that their friendship was still intact. The visit occurred prior to closing argument, instructions and deliberation.

***State v. Sutphin***, (continued)

Syl. pt. 1 - "A motion for a new trial on the ground of the misconduct of a jury is addressed to the sound discretion of the court, which as a rule will not be disturbed on appeal where it appears that defendant was not injured by the misconduct or influence complained of. The question as to whether or not a juror has been subjected to improper influence affecting the verdict, is a fact primarily to be determined by the trial judge from the circumstances, which must be clear and convincing to require a new trial, proof of mere opportunity to influence the jury being insufficient." Syllabus Point 7, *State v. Johnson*, 111 W.Va. 653, 164 S.E. 31 (1932).

Syl. pt. 2 - In any case where there are allegations of any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about a matter pending before the jury not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial with full knowledge of the parties; it is the duty of the trial judge upon learning of the alleged communication, contact, or tampering, to conduct a hearing as soon as is practicable, with all parties present; and a record made in order to fully consider any evidence of influence or prejudice; and thereafter to make findings and conclusions at to whether such communication, contact, or tampering was prejudicial to the defendant to the extent that he has not received a fair trial.

Syl. pt. 3 - In the absence of any evidence that an interested party induced the juror misconduct, no jury verdict will be reversed on the ground of juror misconduct unless the defendant proves by clear and convincing evidence that the misconduct has prejudiced the defendant to the extent that the defendant has not received a fair trial.

***State v. Sutphin***, (continued)

The Court noted the trial court held hearings upon being informed of the contact; apparently appellant's guilt or innocence was not discussed, nor the witness' testimony. The trial court refused to grant a mistrial, finding insufficient prejudice. See *Remmer v. United States*, 347 U.S. 227 (1954). See also, *State v. Daniel*, 182 W.Va. 643, 391 S.E.2d 90 (1990); *Legg v. Jones*, 126 W.Va. 757, 30 S.E.2d 76 (1944); *State v. Johnson*, 111 W.Va. 653, 164 S.E. 31 (1932); and *United States v. Klee*, 494 F.2d 394 (9th Cir.), *cert. denied*, 419 U.S. 835 (1974). The Court agreed. No error.

**Judge's communication with jury**

***State v. Allen***, 455 S.E.2d 541 (1994) (Cleckley, J.)

See RIGHT TO BE PRESENT All stages of proceedings, (p. 564) for discussion of topic.

**Juror viewed scene**

***State v. Linkous***, 460 S.E.2d 288 (1995) (Per Curiam)

Appellant was convicted of negligent homicide. The circuit court refused appellant's request for individual *voir dire* of a juror who drove past the accident scene. The circuit court questioned the juror, who said she "just glanced, that's it, and went on."

Syl. pt. 3 - " 'When a trial court determines that prospective jurors have been exposed to information which may be prejudicial, the trial court, upon its own motion or motion of counsel, shall question or permit the questioning of the prospective jurors individually, out of the presence of the other prospective jurors, to ascertain whether the prospective jurors remain free of bias or prejudice.' Syl. Pt. 1, *State v. Finley*, 177 W.Va. 554, 355 S.E.2d 47 (1987)." Syllabus Point 4, *State v. Knotts*, 187 W.Va. 795, 421 S.E.2d 917 (1992).

**JURY**

**Prejudicing** (continued)

**Juror viewed scene** (continued)

***State v. Linkous***, (continued)

This juror indicated no prejudice and the judge admonished her not to discuss the accident with other jury members. Finally, this juror was actually struck by the prosecution. No error.

**Qualifications**

**Generally**

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See JURY Bias, Generally, (p. 423) for discussion of topic.

**Racial discrimination in selection**

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

See EQUAL PROTECTION Right to jury free of racial discrimination, (p. 201) for discussion of topic.

**Selection**

**Racial discrimination in**

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

See EQUAL PROTECTION Right to jury free of racial discrimination, (p. 201) for discussion of topic.

## JURY

### Unanimous verdict required

***State v. Allen***, 455 S.E.2d 541 (1994) (Cleckley, J.)

See RIGHT TO BE PRESENT All stages of proceedings, (p. 564) for discussion of topic.

### Verdict

#### Reference to dictionary

***State v. Richards***, 466 S.E.2d 395 (1995) (Per Curiam)

See JURY Misconduct, Reference to dictionary, (p. 428) for discussion of topic.

### *Voir dire*

***Michael v. Sabado***, 453 S.E.2d 419 (1994) (Cleckley, J.)

(**NOTE**: while involving an estate, this case is included for the limited purpose of *voir dire* matters discussed).

This wrongful death action arose over the death of Randi Michael; her mother brought the action, claiming an unnecessary tonsillectomy resulted in death, despite proper procedures. Plaintiff claimed misdiagnosis and other negligence both pre-operative and post-operative.

Plaintiff requested individual *voir dire* or, alternatively, submission of a jury questionnaire, both of which were denied.

Syl. pt. 1 - " ' "[T]he inquiry made of a jury on its *voir dire* is within the sound discretion of the trial court and not subject to review, except when the discretion is clearly abused." Syl. pt. 2, *State v. Beacraft*, 126 W.Va. 895, 30 S.E.2d 541 (1944) [,*overruled on other grounds*, *State v. Dolin*, 176 W.Va. 688, 347 S.E.2d 208 (1986), *overruled on other grounds*, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990)].' Syllabus Point 2, *State v. Mayle*, 178 W.Va. 26, 357 S.E.2d 219 (1987)." Syllabus Point 5, *in part*, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

**JURY**

***Voir dire*** (continued)

***Michael v. Sabado***, (continued)

Syl. pt. 2 - The official purpose of *voir dire* is to elicit information which will establish a basis for challenges for cause and to acquire information that will afford the parties an intelligent exercise of peremptory challenges. The means and methods that the trial judge uses to accomplish these purposes are within his discretion.

Syl. pt. 3 - A trial court may not limit *voir dire* to the extent that the very purpose of *voir dire* has been substantially undermined or frustrated. Thus, a trial court may abuse its discretion if it so limits the *voir dire* to the degree that the litigants are unable to determine whether the jurors are statutorily qualified or free from bias.

The Court noted *State v. Finley*, 177 W.Va. 554, 355 S.E.2d 47 (1987), requires individual *voir dire* when necessary to ensure a juror is free of bias; the standard to be used, however, is within the judge's discretion. Nothing in the record indicated individual prejudice sufficient to require further inquiry; the judge's general questions to all jurors were sufficient. No abuse of discretion.

**Following view of crime scene**

***State v. Linkous***, 460 S.E.2d 288 (1995) (Per Curiam)

See JURY Prejudicing, Juror viewed scene, (p. 431) for discussion of topic.

**Sufficiency of**

***State v. Derr***, 451 S.E.2d 731 (1994) (Cleckley, J.)

See VENUE Change of venue, Sufficiency of proof for, (p. 698) for discussion of topic.

## JUVENILES

### Confidentiality of records

***Ogden Newspapers v. City of Williamstown***, 453 S.E.2d 631 (1994) (Neely, J.)

*The Parkersburg News*, a division of Ogden Newspapers, Inc., made a written request under the West Virginia Freedom of Information Act for an incident report from the Williamstown Police Department involving a 22 February 1993 fight between two juveniles involving a firearm. The Department refused the request because the information concerned juveniles.

The circuit court granted the City's motion to dismiss, ruling that the information is exempt under the law enforcement exemption to the Freedom of Information Act and that the incident is not a public record because it involved juveniles.

Syl. pt. 1 - To the extent that information in an incident report dealing with the detection and investigation of crime will not compromise an ongoing law enforcement investigation, we hold that there is a public right of access under the West Virginia Freedom of Information Act.

Syl. pt. 2 - When incidents affecting public safety and welfare can be publicized without revealing the identities of juveniles involved by means other than the application of a blanket rule of nondisclosure, and incident report should be released to the press with the names of any juveniles "(along with any information that could reasonably lead to the discovery of the identity of the juveniles)" redacted; redaction offers the least intrusive means of protecting the identity of juveniles, while respecting the right of public under the *West Virginia Freedom of Information Act*, *W.Va. Code*, 29B-1-1 [1977] *et seq*.

Syl. pt. 3 - Broadly defining juvenile records to include redacted incident reports is not necessary to protect the identity of the juveniles and to preserve the confidentiality of their records.

## JUVENILES

### Confidentiality of records (continued)

***Ogden Newspapers v. City of Williamstown***, (continued)

The Court found the police incident report is clearly a "public record" as defined in *W.Va. Code*, 29B-1-2. See *Hagel v. Pine Bluff*, 821 S.W.2d 761 (Ark. 1991); *Asbury Park Press, Inc. v. Borough of Seaside Heights*, 586 A.2d 870 (N.J. 1990). Further, West Virginia has both statutory and common law allowing access to public records. The question was whether the law enforcement exception forbade disclosure. *Hechler v. Casey*, 175 W.Va. 434, 333 S.E.2d 799 (1985).

Here, although the record fell within the exception, the Court held society's interests may still require some disclosure. *See Houston Chronicle Pub. Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App. 1975); *Sattler v. Holliday*, 173 W.Va. 471, 318 S.E.2d 50 (1984). In addition, juveniles are to be protected. *State v. Boles*, 147 W.Va. 764, 130 S.E.2d 192 (1963); see also *Daily Mail Pub. Co. v. Smith*, 161 W.Va. 684, 248 S.E.2d 269 (1978).

An abbreviated ("redacted") incident report gives public access while protecting both law enforcement and the juveniles themselves. Reversed and remanded.

### Detention

#### Factors to consider

***Larry L. v. State***, 444 S.E.2d 43 (1994) (Per Curiam)

See JUVENILES Detention, Least restrictive alternative, (p. 437) for discussion of topic.

#### Findings required for

***Larry L. v. State***, 444 S.E.2d 43 (1994) (Per Curiam)

See JUVENILES Detention, Least restrictive alternative, (p. 437) for discussion of topic.

## JUVENILES

### Detention (continued)

#### Least restrictive alternative

***Larry L. v. State***, 444 S.E.2d 43 (1994) (Per Curiam)

Larry L. was adjudicated delinquent and committed to the custody of the Department of Health and Human Resources; he was then placed in the Children's Home in Elkins. Larry L. had a long history of truancy and disruption at home and at school. Although his home behavior improved, he continued to miss school and be disruptive there. With this petition he sought return to his parents.

Syl. pt. - "In order for a juvenile to be properly committed to a juvenile correctional facility, *W.Va. Code*, § 49-5-13(b)(5) (1978) requires a "finding" that 'no less restrictive alternative would accomplish the requisite rehabilitation of the child.' The failure to set forth such a finding on the record deprives the Court of authority to order such a commitment." Syllabus point 1, *State ex rel. S.J.C. v. Fox*, 165 W.Va. 314, 268 S.E.2d 56 (1980).

The Court found insufficient evidence on which to determine whether commitment was in the child's best interests: no counseling was attempted, assuming that counseling was available; no other alternatives were explored; and it is unclear whether his mother wanted Larry back.

The Court especially noted that only a status offense was at issue here. Reversed and remanded.

### Facilities Review Panel

#### Access to facilities

***State ex rel. Juvenile Justice Committee v. Lewis***, No. 23006 (10/13/95) (Per Curiam)

Relators sought writ of mandamus to compel respondents to provide access to juvenile facilities, residents and records, including places out of the state. See *W.Va. Code*, 49-5-16(b). Certain records were denied by respondents, who claim they cannot be released pursuant to *W.Va. Code*, 49-6A-5 (1994).

**JUVENILES**

**Facilities Review Panel** (continued)

**Access to facilities** (continued)

***State ex rel. Juvenile Justice Committee v. Lewis***, (continued)

The Court granted the writ but admonished relators to observe the confidentiality required by *W.Va. Code*, 49-6A-5.

**First offenders**

**Judge's overreaction to**

***State v. Eddie "Tosh" K.***, 460 S.E.2d 489 (1995) (Per Curiam)

Appellant, who was then sixteen, and four other students were involved in a fight. All five were suspended and charged with battery; two were eighteen and pled guilty to battery. Appellant was tried as a juvenile and placed on six months probation.

On appeal he claimed error in the circuit judge's refusal to disqualify himself, in denial of his motion for public proceedings, in denial of his motion for acquittal, and denial of his motion for new trial.

Syl. pt. 1 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syl. pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 2 - "Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Syl. pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).

**JUVENILES**

**First offenders** (continued)

**Judge's overreaction to** (continued)

***State v. Eddie "Tosh" K.***, (continued)

Syl. pt. 3 - " 'Moot questions or abstract propositions, the decision of which would avail nothing in the determination of controverted rights of persons or of property, are not properly cognizable by a court.' Syllabus Point 1, *State ex rel. Lilly v. Carter*, 63 W.Va. 684, 60 S.E. 873 (1908)." Syllabus, *Standard Hydraulics, Inc. v. Kerns*, 182 W.Va. 225, 387 S.E.2d 130 (1989).

Syl. pt. 4 - " 'An order to which no objection was made and which was actually approved by counsel, will not be reviewed on appeal.' Syl. pt. 1, *Loar v. Massey*, 164 W.Va. 155, 261 S.E.2d 83 (1979)." Syl. pt. 3, *In the Interest of S.C.*, 168 W.Va. 366, 284 S.E.2d 867 (1981).

The Court noted that a relatively minor fist fight, without serious injury, should not have resulted in such a serious response. The circuit court was apparently heavy handed in placing a youth with no prior offenses in the Industrial Home for Youth for thirty days for diagnostic testing (requiring a writ of prohibition for his release).

Appellant's attorney did not raise a single objection during the hearing, including the detention at Salem and the judge's refusal to release a statement made by the high school principal.

Reluctantly, the Court found no error even though the trial judge instructed the jury on assault (not battery as charged). The standard of review is the same as for criminal cases; when viewed most favorably to the state, the evidence was sufficient (despite Justice Cleckley's objection to using *Starkey*, *supra*, as the standard for review).

**JUVENILES**

**First offenders** (continued)

**Judge's overreaction to** (continued)

***State v. Eddie "Tosh" K.***, (continued)

As to the errors which went unopposed, "when there has been a knowing and intentional relinquishment or abandonment of a known right...." there is no error to subject to plain error analysis. *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995). The Court was especially concerned over the refusal of the trial court to allow a public hearing at sentencing; had the request for waiver of confidentiality come prior to the adjudicatory hearing a different result may have been reached. The Court strongly suggested that any documents like the principal's statement be made a part of the record, regardless of content; sensitive statements can be sealed.

The Court did refuse to impose the costs of psychological tests on the parents, in light of their indigent status and clearly invited an ineffective assistance claim under the writ of coram nobis. See Cleckley, *Handbook on West Virginia Criminal Procedure* II-508 to 509 (2d Ed. 1993). Generally Affirmed; reversed in part.

**Freedom of information**

***Ogden Newspapers v. City of Williamstown***, 453 S.E.2d 631 (1994) (Neely, J.)

See JUVENILES Confidentiality of records, (p. 435) for discussion of topic.

**Ineffective assistance**

***State v. Eddie "Tosh" K.***, 460 S.E.2d 489 (1995) (Per Curiam)

See JUVENILES First offenders, Judge's overreaction to, (p. 438) for discussion of topic.

## JUVENILES

### Parental notification

#### Waiver of rights

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See JUVENILE Self-incrimination, Waiver of right to counsel, (p. 447) for discussion of topic.

### Preliminary hearing

#### Purpose of

***In the Matter of Stephfon W.***, 442 S.E.2d 717 (1994) (Miller, J.)

These combined matters concerned two juveniles transferred to adult jurisdiction and charged with murder. At a combined preliminary hearing the prosecution introduced confessions, to which defense counsel objected based on voluntariness. Proposed findings of fact and conclusions of law offered by the prosecution were accepted and made part of pretrial orders finding probable cause and deeming the confessions voluntary.

At the subsequent transfer hearing defense counsels' motion for continuance was denied and the court adopted the earlier findings. Both were transferred to adult jurisdiction.

Syl. pt. 1 - The primary purpose of a preliminary hearing under *W.Va. Code*, 49-5-9 (1982), is to require the State to prove there is probable cause to believe that the child is a delinquent child.

***In the Matter of Stephfon W.***, (continued)

Syl. pt. 2 - The juvenile transfer statute, *W.Va. Code*, 49-5-10 (1978), and *W.Va. Code*, 49-5-1 (1978), which contains general provisions regarding hearing rights, provide substantial due process rights that must be accorded a juvenile at a transfer hearing, including: (1) an advance written notice of the grounds relied upon for transfer; (2) an opportunity to be heard in person and to present witnesses and evidence; (3) the right to confront and cross-examine adverse witnesses; (4) a neutral fearing officer; (5) the right to have counsel present including court-appointed counsel if indigent; (6) a record of the evidence presented at the hearing; (7) findings of fact and conclusions of law upon which the transfer decision is based; and (8) a right of direct appeal to this Court.

Syl. pt. 3 - " '*W.Va. Code*, § 49-5-10(d) [1978] requires that the circuit court make an independent determination of whether there is probable cause to believe that a juvenile has committed one of the crimes specified for transferring the proceeding to criminal jurisdiction.' Syllabus, *In the Interest of Clark*, 168 W.Va. 493, 285 S.E.2d 369 (1981)." Syllabus Point 4, *In the Interest of Moss*, 170 W.Va. 543, 295 S.E.2d 33 (1982).

Syl. pt. 4 - "The probable cause determination at a juvenile transfer hearing may not be based entirely on hearsay evidence." Syllabus Point 3, *In the Interest of Moss*, 170 W.Va. 543, 295 S.E.2d 33 (1982).

Syl. pt. 5 - " ' "Before transfer of a juvenile to criminal court, a juvenile court judge must make a careful, detailed analysis into the child's mental and physical condition, maturity, emotional attitude, home or family environment, school experience and other similar personal factors. *W.Va. Code*, 49-5-10(d)." Syl. Pt. 4, *State v. C.J.S.*, 164 W.Va. 473, 263 S.E.2d 899 (1980), *overruled in part on other grounds* [in] *State v. Petry*, 166 W.Va. 153, 273 S.E.2d 346 (1980) and *State ex rel. Cook v. Helms*, 170 W.Va. 200, 292 S.E.2d 610 (1981)'. Syl. Pt. 2, *State v. Sonja B.*, 183 W.Va. 380, 395 S.E.2d 803 (1990)." Syllabus Point 4, *State v. Gary F.*, 189 W.Va. 523, 432 S.E.2d 793 (1993).

**JUVENILES**

**Preliminary hearing** (continued)

**Purpose of** (continued)

***In the Matter of Stephfon W.***, (continued)

Syl. pt. 6 - The State may not rely on the evidentiary transcript of the preliminary hearing or the findings of fact and conclusion of law made at such hearing to establish probable cause at the transfer hearing.

Syl. pt. 7 - " 'At a transfer hearing, the court must determine the validity of a confession before allowing it to be used against the accused.' Syllabus Point 6, *In the Interest of Moss*, 170 W.Va. 543, 295 S.E.2d 33 (1982)." Syllabus Point 4, *In the Matter of Mark E.P.*, 175 W.Va. 83, 331 S.E.2d 813 (1985).

The Court noted that a juvenile is not required to offer evidence or contest the state's presentation at a preliminary hearing, while the transfer hearing is a matter of grave importance since the juvenile thereby loses his special status as a juvenile. The circuit court must make an independent determination, not merely accept earlier findings. The juvenile must be given the right to be heard, present witnesses, confront his accuser and cross-examine adverse witnesses. Reversed and remanded.

**Probation**

**Eligibility for**

***State ex rel. Hill v. Zakaib***, 461 S.E.2d 194 (1995) (Fox, J.)

Petitioner was arrested for first-degree murder two months before his fifteenth birthday. He was transferred to adult status and pled guilty to second-degree murder, whereupon he was sent to the Industrial Home for Youth pursuant to *W.Va. Code*, 49-5-16(b) until he reached eighteen; his sentence was set at five to eighteen years.

**JUVENILES**

**Probation** (continued)

**Eligibility for** (continued)

***State ex rel. Hill v. Zakaib***, (continued)

Upon reaching eighteen petitioner was brought before the circuit court for reconsideration of his sentence (see *W.Va. Code*, 49-5-16(b). Although the Department of Corrections recommended petitioner serve the remainder of his minimum sentence at Anthony the prosecution recommended he be confined "until he completes the program." The circuit court suspended the original five to eighteen and committed petitioner to the Anthony center "for six months, or longer, if it is advisable by the center superintendent, but in any event such period of confinement shall not exceed two years."

Upon successful completion of the six month program petitioner asked to be put on probation pursuant to *W.Va. Code*, 25-4-6. The prosecution challenged the constitutionality of *W.Va. Code*, 25-4-6 and 49-5-16(b). Respondent judge agreed, reinstated the original sentence and ruled that youthful offender status can only be given if the offender were sixteen at the time of the crime. Petitioner claimed here that imposition of the additional term of confinement violates double jeopardy principles. § 5, Art. III, *West Virginia Constitution*; Fifth Amendment, *United States Constitution*.

Syl. pt. 1 - West Virginia Code § 25-4-6 expressly provides that a juvenile male offender who successfully completes a center training program "shall be returned to the jurisdiction of the court which originally committed him. He shall be eligible for probation for the offense with which he is charged, and the judge of the court shall immediately place him on probation."

Syl. pt. 2 - A sentence which is technically infirm, but generally and substantially complies with the spirit and purpose of the law, is not void, but merely voidable. The State or the complaining party may challenge the sentence by timely objection. However, failure to object constitutes a waiver of the right to challenge the legality of the sentence.

Syl. pt. 3 - The discretionary authority vested in the Commissioner of Corrections by *W.Va. Code* §§ 25-4-6 and 49-5-16(b) does not intrude upon the sentencing powers of the courts in an unconstitutional manner. The sentences imposed pursuant to these statutes are neither illegal nor void.

**JUVENILES**

**Probation** (continued)

**Eligibility for** (continued)

***State ex rel. Hill v. Zakaib***, (continued)

*W.Va. Code*, 25-4-6 expressly requires a juvenile offender who completes an Anthony center program to be put on probation. The prosecution should have objected if it did not want petitioner to become eligible for probation after six months.

Although petitioner was technically too young to be sentenced as a youthful offender, the Court found it contrary to the purpose of the statute to void the sentence here. Because the statute was merely voidable and the state did not object, writ granted. Petitioner was released.

**Psychological/psychiatric evaluation**

**Release from**

***State ex rel. E.K. v. Merrifield***, No. 22013 (2/17/94) (Per Curiam)

Petitioner, a sixteen year old, sought writ of habeas corpus and writ of prohibition to obtain release from the Industrial Home for Youth where he was being evaluated for thirty days following conviction on an assault charge. *W.Va. Code*, 49-5-13(a). After issuance of a rule to show cause, petitioner was released and an evaluation performed without confinement.

Respondent claimed he considered alternative methods of evaluation but felt petitioner's demeanor, the probation officer's workload, the need for adequate testing and the lack of local alternatives necessitated sending respondent to the institution. Respondent claimed this petition is moot because the evaluation has been completed.

The Court noted that juvenile cases require special attention but agreed that this petition is moot. Dismissed.

## JUVENILES

### Right of counsel

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See JUVENILE Self-incrimination, Waiver of right to counsel, (p. 447) for discussion of topic.

### Ineffective assistance

***State v. Eddie "Tosh" K.***, 460 S.E.2d 489 (1995) (Per Curiam)

See JUVENILES First offenders, Judge's overreaction to, (p. 438) for discussion of topic.

### School attendance

#### Responsibility of parent or guardian

***State ex rel. Estes v. Egnor***, 443 S.E.2d 193 (1994) (Miller, J.)

Relator, an eighteen year old high school student, asked for writ of prohibition to prevent his prosecution on charges that he had unexcused absences from school in violation of *W.Va. Code*, 18-8-2. He claimed that prosecution can only be brought against a parent or guardian and not against a student.

Syl. pt. 1 - " ' "When a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute." Point 1, syllabus, *State ex rel. Fox v. Board of Trustees of the Policemen's Pension or Relief Fund of the City of Bluefield, et al.*, 148 W.Va. 369 [135 S.E.2d 262 (1964)].' Syllabus Point 1, *State ex rel. Board of Trustees v. City of Bluefield*, 153 W.Va. 210, 168 S.E.2d 525 (1969)." Syllabus Point 1, *West Virginia Radiologic Technology Board v. Darby*, 189 W.Va. 52, 427 S.E.2d 486 (1993).

**JUVENILES**

**School attendance** (continued)

**Responsibility of parent or guardian** (continued)

***State ex rel. Estes v. Egnor***, (continued)

Syl. pt. 2 - *W.Va. Code*, 18-8-2 (1988), provides that any person who has legal or actual charge of a child and receives due notice that the child has failed to attend school and fails to cause the child to attend school is guilty of a misdemeanor. This statute does not provide that it is a misdemeanor for the student to fail to attend school.

Syl. pt. 3 - If a student disobeys a school policy, such as by having unexcused absences, he may be suspended under *W.Va. Code*, 18-8-8 (1951), and shall not be readmitted to school under *W.Va. Code*, 18-5-15(c) (1983), without the approval of the county superintendent.

Syl. pt. 4 - " ' "Prohibition will lie to prohibit a judge from exceeding his legitimate powers." Syllabus Point 2, *State ex rel. Winter v. MacQueen*, 161 W.Va. 30, 239 S.E.2d 660 (1977).' Syllabus Point 3, *Smith v. Maynard*, 186 W.Va. 421, 412 S.E.2d 822 (1991)." Syllabus Point 6, *State ex rel. Board of Education v. Perry*, 189 W.Va. 662, 434 S.E.2d 22 (1993).

The Court refused the state's argument that the statute applied to relator because he was eighteen years of age (see *W.Va. Code*, 18-8-1 and 1a). *W.Va. Code*, 18-8-2 does not apply to the student. The Court noted other provisions of the article can be used to discipline an eighteen year old student who does not comply with the requirements of the school. Writ granted.

**Self-incrimination**

**Waiver of right to counsel**

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

Appellant was convicted of aggravated robbery. He was apprehended in the vicinity of a local gasoline station which had been robbed. Police read him his *Miranda* rights while holding him face down on the ground. After arriving at the police station, it was discovered that appellant was seventeen.

***State v. Sugg***, (continued)

Police claimed that appellant told Lt. James Miller that he wanted to talk. Appellant claimed he denied involvement and changed his story after interrogation, which interrogation occurred after police knew appellant was a minor. Appellant waived his rights at 10:36 p.m. and gave a statement between 10:50 p.m. and 12:45 a.m. After obtaining a confession police called appellant's parents and took appellant before a magistrate between 1:30 and 2:00 a.m.

Syl. pt. 1 - The validity of a juvenile's waiver of his or her rights should be evaluated in light of the totality of the circumstances surrounding the waiver, and the presence or absence of the parents is but one factor to be considered in reaching this determination.

Syl. pt. 2 - Where neither legal counsel nor the parents are present during interrogation, the greatest cafe must be taken by the trial court to assure that the statement of the juvenile is voluntary, in the sense not only that it was not coerced or suggested, but that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair.

Syl. pt. 3 - The absence of a parent or counsel when a juvenile waives his rights is not necessarily a bar to a voluntary *Miranda* waiver and ultimately a confession.

Syl. pt. 4 - The appropriate inquiry in regard to parental notification is whether, after a careful review of the record in its entirety, the reasons underlying the delay in notifying the parents, as agreed to by the juvenile, set forth a sufficient factual basis which support a finding that the delay was initiated or suggested by the juvenile and the police did nothing during the period of the delay to take advantage of the juvenile's youth and inexperience. If a juvenile affirmatively requests that his parents not be notified until after he talks to the police and this request is not coerced or suggested by the police, a juvenile cannot take advantage of that discreet period of time it takes to conduct the interview.

**JUVENILES**

**Self-incrimination** (continued)

**Waiver of right to counsel** (continued)

***State v. Sugg***, (continued)

The Court noted *W.Va. Code*, 49-5-8(d) requires a more stringent prompt presentment standard than that for adults in *W.Va. Code*, 62-1-5 and *W.Va.R.Crim.P.* 5(a). However, the record here indicated appellant refused to have either a lawyer or his parents present when he talked with police. The delay was apparently caused by appellant's own insistence on talking with police. No error.

As to his waiver of rights, the Court noted a juvenile may waive his rights without the presence of an adult. *Fare v. Michael C.*, 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). The totality of the circumstances test was applied (see application in *State v. Laws*, 162 W.Va. 359 at 363, 251 S.E.2d 769 at 772 (1978); see also, *State v. Kilmer*, 190 W.Va. 617, 439 S.E.2d 881 (1993); *State v. Randolph*, 178 W.Va. 1, 357 S.E.2d 34 (1987). The prosecution has a heavy burden in establishing a knowing and intelligent waiver. *State v. Boyd*, 167 W.Va. 385, 280 S.E.2d 669 (1981). However, the trial court is to be given discretion in determining when a sufficient waiver has occurred. No abuse here.

Finally, violating the requirements of parental notification in *W.Va. Code*, 49-5-8(b)(4)(i) can be justified here. The Court declined to automatically exclude confessions obtained without parental notification. No abuse of discretion.

## JUVENILES

### Sentencing

#### Reconsideration upon reaching majority

***State v. Harris***, 464 S.E.2d 363 (1995) (Cleckley, J.)

Appellant was tried as an adult and convicted of first-degree murder; he was sentenced to life with mercy pursuant to a plea bargain which provided for incarceration for life in the state penitentiary, with eligibility for parole after ten years. Following his eighteenth birthday the court, without a hearing, ordered him transferred to the state penitentiary. He claimed he was entitled to a hearing to evaluate his status prior to transfer. *See W.Va. Code*, 49-5-16(b).

Syl. pt. 1 - The test for determining whether a departure from *State v. Highland*, 174 W.Va. 525, 327 S.E.2d 703 (1985), and *W.Va. Code*, 49-5-16(b) (1982), is permitted is two-fold: (1) Was the particular circumstance (the basis for the proposed departure) adequately taken into consideration at the time the plea agreement was accepted by the circuit court; and (2) If it was, were the plea and the plea agreement a knowing and intelligent waiver of the rights provided by *Highland* and *W.Va. Code*, 49-5-16(b). Thus, the most important inquiry is whether there is evidence of a knowing and intelligent waiver.

Syl. pt. 2 - Except in specific, well-defined circumstances, a pretransfer hearing pursuant to *W.Va. Code*, 49-5-16(b) (1982), is not necessary when all the significant information is already in the breast of the circuit court and there is no significant dispute between the parties as to the accuracy and relevancy of the information.

The Court agreed that *W.Va. Code*, 49-5-16(b) should control over the more general murder sentencing statute, *W.Va. Code*, 61-2-2 (which calls for confinement for life). However, here, unlike in *Highland*, *supra*, both the Commissioner of Corrections and the sentencing court determined the transfer to the penitentiary was appropriate. Further, the Court found the juvenile knowingly and intelligently waived the hearing in exchange for a lesser sentence (with mercy). No error.

## JUVENILES

### Transfer to adult jurisdiction

#### Due process

***In the Matter of Stephfon W.***, 442 S.E.2d 717 (1994) (Miller, J.)

See JUVENILES Preliminary hearing, Purpose of, (p. 441) for discussion of topic.

#### Factors to consider

***In the Matter of Stephfon W.***, 442 S.E.2d 717 (1994) (Miller, J.)

See JUVENILES Preliminary hearing, Purpose of, (p. 441) for discussion of topic.

#### Sentencing upon reaching majority

***State v. Harris***, 464 S.E.2d 363 (1995) (Cleckley, J.)

See JUVENILES Sentencing, Reconsideration upon reaching majority, (p. 450) for discussion of topic.

### Waiver of rights

#### Parental notification

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See JUVENILE Self-incrimination, Waiver of right to counsel, (p. 447) for discussion of topic.

## KIDNAPING

### Incidental to another offense

***State v. Farmer***, 445 S.E.2d 759 (1994) (Per Curiam)

Appellant was convicted of first-degree murder and kidnaping. On appeal he claims error in allowing the jury to consider both the kidnaping and the murder charges.

Syl. pt. 3 - "In interpreting and applying a generally worded kidnaping statute, such as *W.Va. Code*, 61-2-14a, in a situation where another offense was committed, some reasonable limitations on the broad scope of kidnaping must be developed. The general rule is that kidnaping has not been committed when it is incidental to another crime. In deciding whether the acts that technically constitute kidnaping were incidental to another crime, courts examine the length of time the victim was held or moved, the distance the victim was forced to move, the location and environment of the place the victim was detained, and the exposure of the victim to an increased risk of harm." Syllabus Point 2, *State v. Miller*, 175 W.Va. 616, 336 S.E.2d 910 (1985).

Here, the kidnaping was for the purpose of murdering the victim. He was shot while being transported to a remote area and then killed. The Court found the kidnaping was not merely incidental to the murder. No error.

### Sentencing

#### Factual determination by judge

***State v. Farmer***, 454 S.E.2d 378 (1994) (McHugh, J.)

See SENTENCING Kidnaping, Factual determination by judge, (p. 629) for discussion of topic.

## LESSER INCLUDED OFFENSES

### Generally

***State v. Hottinger***, 461 S.E.2d 462 (1995) (Per Curiam)

See SEXUAL ATTACKS Lesser included offenses, Fornication as lesser of assault, (p. 640) for discussion of topic.

***State v. Shane***, 465 S.E.2d 640 (1995) (Per Curiam)

See INSTRUCTIONS Lesser included offenses, (p. 385) for discussion of topic.

### Sexual assault

#### Fornication as lesser of

***State v. Hottinger***, 461 S.E.2d 462 (1995) (Per Curiam)

See SEXUAL ATTACKS Lesser included offenses, Fornication as lesser of assault, (p. 640) for discussion of topic.

## MAGISTRATE COURT

### Admonishment

***In the Matter of Harshbarger***, 450 S.E.2d 667 (1994) (Per Curiam)

See MAGISTRATE COURT Discipline, Election violations, (p. 462) for discussion of topic.

### Alcoholism

***In the Matter of Queen***, No. 23102 (12/7/95) (Per Curiam)

See MAGISTRATE COURT Discipline, Alcoholism, (p. 458) for discussion of topic.

### Appeal from

***State ex rel. Collins v. Bedell***, 460 S.E.2d 636 (1995) (McHugh, C.J.)
(consolidated) ***State ex rel. Peeples v. Knight***, 460 S.E.2d 636 (1995) (McHugh, C.J.)

Appellants' petitions sought writs of prohibition to prevent denial of their trials *de novo* in circuit court following conviction in magistrate court. Petitioner Peeples was arrested following the June 10, 1994 amendments to the magistrate court system; Petitioner Collins was arrested and had waived his right to jury trial when the amendments took effect.

Prior to June 10, 1994 petitioners had a statutory right to a trial *de novo* in circuit court following a conviction in magistrate court. *W.Va. Code*, 50-5-13 [1994] was amended to allow only an appeal on the record and *W.Va. Code*, 50-5-8(e) [1994] was added to require recordation of magistrate court trials to produce that record.

*W.Va. Code*, 50-5-13(b) [1994] further allows for a "trial *de novo* triable to the court, without a jury" when a jury trial is waived in magistrate court. However, a jury trial may be granted if the circuit court finds that the defendant was "effectively denied a jury trial" below. *W.Va. Code*, 50-5-13(c)(5) [1994]. In addition, the circuit court may reverse, affirm, remand or modify.

**MAGISTRATE COURT**

**Appeal from** (continued)

***State ex rel. Collins v. Bedell***, (continued)
(consolidated) ***State ex rel. Peeples v. Knight***, (continued)

Petitioner Collins was tried before a magistrate after the amendments became effective and convicted of third degree sexual abuse. He sought a trial by jury in the circuit court, which request was denied. Petitioner Peeples was also tried before a magistrate and found guilty of DUI, first offense; his request for jury trial in circuit court was also denied.

They claimed the new process denied them the right to trial by jury, *W.Va. Const*. Art. III, § 14 and VIII, § 10, and through right to due process of law in that non-lawyer magistrates are allowed to preside over their only jury trial. *W.Va. Const*. Art. III, § 10; *United States Constitution*, amend. XIV, § 1.

Syl. pt. 1 - " ' "In considering the constitutionality of a legislative enactment, courts must exercise due restraint, in recognition of the principle of the separation of powers in government among the judicial, legislative and executive branches. Every reasonable construction must be resorted to by the courts in order to sustain constitutionality, and any reasonable doubt must be resolved in favor of the constitutionality of the legislative enactment in question. Courts are not concerned with questions relating to legislative policy. The general powers of the legislature, within constitutional limits, are almost plenary. In considering the constitutionality of an act of the legislature, the negation of legislative power must appear beyond reasonable doubt." Point 1 Syllabus, *State ex rel. Appalachian Power Company v. Gainer*, 149 W.Va. 740, 143 S.E.2d 351 (1965).' Syl. pt. 3, *State ex rel. W.Va. Housing Development Fund v. Copenhaver*, 153 W.Va. 636, 171 S.E.2d 545 (1969)." Syl. pt. 3, *State ex rel. Lambert v. County Comm'n*, 192 W.Va. 448, 452 S.E.2d 906 (1994).

Syl. pt. 2 - *W.Va. Code*, 50-5-13 [1994], which sets forth the appeal procedure in a criminal proceeding from magistrate court to circuit court, but which does not give the defendant a statutory right to a jury trial *de novo* on the appeal to circuit court, does not violate *W.Va. Const*. art. III, § 14 or art. VIII, § 10.

**MAGISTRATE COURT**

**Appeal from** (continued)

***State ex rel. Collins v. Bedell***, (continued)
(consolidated) ***State ex rel. Peeples v. Knight***, (continued)

Syl. pt. 3 - A defendant's due process rights set forth in *W.Va. Const*. art. III, § 10 and the *U.S. Const*. amend. XIV, § 1 are not violated when a non-lawyer magistrate presides over the trial because *W.Va. Code*, 50-5-13 [1994] provides meaningful review on appeal.

Syl. pt. 4 - " 'General and indefinite terms of one provision of a constitution, literally embracing numerous subjects, are impliedly limited and restrained by definite and specific terms of another, necessarily and inexorably withdrawing from the operation of such general terms, a subject which, but for such implied withdrawal, would be embraced and governed by them." Syllabus Point 5, *Lawson v. Kanawha County Court*, 80 W.Va. 612, 92 S.E. 786 (1917)." Syl. pt. 1, *State ex rel. Boards of Educ. v. Chafin*, 180 W.Va. 219, 376 S.E.2d 113 (1988).

Syl. pt. 5 - " 'A constitutional amendment, as the last word from the people on a subject under consideration, should be given controlling effect where there is irreconcilable conflict between it and other constitutional provisions, but no such effect should be given where it and other provisions of the *Constitution* may be read together and harmonized without destroying the effect and purpose of any of them.' Syllabus Point 3, *Berry v. Fox*, 114 W.Va. 513, 172 S.E. 896 (1934)." Syl. pt. 2, *State ex rel. Boards of Educ. v. Chafin*, 180 W.Va. 219, 376 S.E.2d 113 (1988).

Syl. pt. 6 - "Under *ex post facto* principles of the *United States* and *West Virginia Constitutions*, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him." Syl. pt. 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 162 S.E.2d 885 (1980).

Syl. pt. 7 - A procedural change in a criminal proceeding does not violate the *ex post facto* principle found in the *W.Va. Const*. art. III, § 4 and in the *U.S. Const*. art. I, § 10 unless the procedural change alters the definition of a crime so that what is currently punished as a crime was an innocent act when committed; deprives the accused of a defense which existed when the crime was committed; or increases the punishment for the crime after it was committed.

**MAGISTRATE COURT**

**Appeal from** (continued)

***State ex rel. Collins v. Bedell***, (continued)
(consolidated) ***State ex rel. Peeples v. Knight***, (continued)

Syl. pt. 8 - "In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." Syl. pt. 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

The Court noted the state *Constitution* does not require a twelve person jury on appeal from magistrate court, only that some appeal from magistrate court be given. (A six person jury satisfies the right to trial by jury. *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). No denial of either due process or equal protection. Similarly, trial before a nonlawyer is not a denial of due process.

Application of the new procedures to petitioner Collins after his waiver of his right to a jury trial did not violate ex post facto principles because ex post facto application is concerned with definition of crimes, defenses and punishments, not with procedural rights, however substantial. *Collins v. Youngblood*, 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990). A crime must be redefined so as to cause an act which was innocent when committed to become unlawful in retrospect; or a defense must be taken away; or a punishment must be increased. However, because waiver of the right to a jury trial must be knowing and intelligent, the Court remanded to determine whether petitioner Collins was given an opportunity to request a jury trial after the statutory amendments took effect.

## MAGISTRATE COURT

### Discipline

#### Admonishment

***In the Matter of Harshbarger***, 450 S.E.2d 667 (1994) (Per Curiam)

See MAGISTRATE COURT Discipline, Election violations, (p. 462) for discussion of topic.

#### Alcoholism

***In the Matter of Queen***, No. 23102 (12/7/95) (Per Curiam)

Pursuant to Rule 2.14(a) and (b) of the *Rules of Judicial Disciplinary Procedure* the Judicial Disciplinary Counsel submitted a report alleging Magistrate Queen's disability due to alcoholism. Magistrate Queen claimed his ability to serve is not significantly impaired and that he is currently in treatment.

The Court found sufficient evidence to require suspension with pay during Magistrate Queen's active treatment. Rule 2.14(c), *Rules of Judicial Disciplinary Procedure*. The Court also referred the matter to the Judicial Committee on Assistance and Intervention.

#### Campaign violations

***In the Matter of Mendez***, 450 S.E.2d 646 (1994) (Per Curiam)

Magistrate Mendez pled guilty to violating *W.Va. Code*, 3-8-5d, receiving and expending illegal cash contributions during his 1988 election campaign. The Hearing Board found he violated Canons 1, 2A and 7B(2) of the Judicial Code of Ethics.

Syl. pt. 1 - "Under Rule III (C) (2) (1983 Supp.) of the *West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates*, the allegations of a complaint in a judicial disciplinary proceeding 'must be proved by clear and convincing evidence.' " Syl. pt. 4, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983)." Syllabus Point 3, *In the Matter of Crislip*, 182 W.Va. 637, 391 S.E.2d 84 (1990).

## MAGISTRATE COURT

### **Discipline** (continued)

#### **Campaign violations** (continued)

***In the Matter of Mendez***, (continued)

Syl. pt. 2 - " 'The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings.' Syl. pt. 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980)." Syllabus Point 1, *In the Matter of Kaufman*, 187 W.Va. 166, 416 S.E.2d 480 (1992).

Syl. pt. 3 - "When the language of a canon under the *Judicial Code of Ethics* is clear and unambiguous, the plain meaning of the cannon is to be accepted and followed without resorting to interpretation or construction." Syllabus Point 1, *In the Matter of Karr*, 182 W.Va. 221, 387 S.E.2d 126 (1989).

The Court found the charges proven. Public censure, $1,000.00 fine and costs.

#### **Domestic violence**

***In the Matter of Browning***, 452 S.E.2d 34 (1994) (Cleckley, J.)

Magistrate Browning was charged with violating Canon 3 of the Judicial Code of Ethics and Canon 1; Canon 2A; Canon 3A, B(1) through (4); and Canon C(1) of the Code of Judicial Conduct. One charge was withdrawn and another dismissed by the Hearing Board.

An environmental inspector attempted to obtain a summons from Magistrate Browning regarding a fish kill near a bridge under construction. Ms. Browning told the inspector she should disqualify herself since she used the bridge in question. The Commission argued that she was obligated to handle the complaint under Rule 4 of the Rules of Criminal Procedure which states that a summon "shall be issued" upon a showing of probable cause.

Magistrate Browning was also accused of failing to follow her schedule or to cooperate in changing her schedule. She took numerous days off from work. In at least one instance the circuit judge had to intervene to force her to work.

**MAGISTRATE COURT**

**Discipline** (continued)

**Domestic violence** (continued)

***In the Matter of Browning***, (continued)

Most seriously, Magistrate Browning failed to issue a protective order in a domestic violence matter. She claimed she was not feeling well and sent the woman in question to the chief magistrate, who did issue the order. In the meantime, Magistrate Browning did some paper work and assisted a man who was complaining about delay; she left work at 1:00 p.m. that day.

Syl. pt. 1 - "The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings." Syllabus Point 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (1980).

Syl. pt. 2 - "Under Rule III(C)(2) (1983) Supp.) of the *West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates*, the allegations of a complaint in a Judicial disciplinary proceeding 'must be proved by clear and convincing evidence.' " Syllabus Point 4, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).

Syl. pt. 3 - " '[W]here a challenge to a judge's impartiality is made for substantial reasons which indicate that the circumstances offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the State and the accused, a judge should recuse himself.' Syllabus Point 14, in part, *Louk v. Haynes*, 159 W.Va. 482, 223 S.E.2d 780 (1976)." Syllabus Point 3, *State ex rel. Brown v. Dietrick*, 191 W.Va. 169, 444 S.E.2d 47 (1994).

Syl. pt. 4 - Except in very limited circumstances, it is improper for a magistrate to act in a case in which the magistrate cannot remain neutral and detached. Therefore, Syllabus Point 2 of *In re Pauley*, 173 W.Va. 475, 318 S.E.2d 418 (1984), quoted in Syllabus Point 4 of *In re Markle*, 174 W.Va. 550, 328 S.E.2d 157 (1984), is limited to situations in which a magistrate is not otherwise disqualified.

**Discipline** (continued)

**Domestic violence** (continued)

***In the Matter of Browning***, (continued)

Syl. pt. 5 - It is not a violation of the Judicial Code of Ethics or the Code of Judicial Conduct to fail to follow mandatory criminal procedure if a magistrate is disqualified from hearing the matter.

Syl. pt. 6 - Domestic violence cases are among those that our courts must give priority status. In *W.Va. Code*, 48-2A-1, *et seq.*, the West Virginia Legislature took steps to ensure that these cases are handled both effectively and efficiently by law enforcement agencies and the judicial system.

Syl. pt. 7 - Magistrates are statutorily required to provide an individual with any assistance necessary to complete a petition for a protective order. Once the petition is completed, the magistrate must file the petition and, upon a showing of sufficient facts, issue a protective order. If a magistrate believes that she or he is disqualified from handling the matter, the magistrate must examine carefully whether the rule of necessity applies. Under no circumstances should a victim of abuse be turned away from a magistrate or a circuit judge without ensuring the victim will receive prompt attention by another magistrate or judge.

As to the environmental summons, the Court found Magistrate Browning acted properly; it limited *In re Pauley*, 173 W.Va. 475, 318 S.E.2d 418 (1984) and *In re Markle*, 174 W.Va. 550, 328 S.E.2d 157 (1984) to instances where a magistrate is not otherwise disqualified.

As to scheduling, the Court found judicial duties must take precedence over other activities. *In the Matter of Harshbarger*, 173 W.Va. 206, 314 S.E.2d 79 (1984); *In the Matter of Osburn*, 173 W.Va. 381, 315 S.E.2d 640 (1984). Violation of Canon 3A and 3C(1).

As to the domestic violence matter, the Court found Magistrate Browning violated Canons 1 and 2A of the Code of Judicial Conduct. Refusal to help the woman in question was dereliction of duty. *W.Va. Code*, 48-2A-3(d) clearly gives domestic violence petitions priority over every other matter. Public reprimand and $500.00 fine for failure to issue a protective order.

## MAGISTRATE COURT

**Discipline** (continued)

### Election violations

***In the Matter of Harshbarger***, 450 S.E.2d 667 (1994) (Per Curiam)

While polling was in process during a municipal election, magistrate Harshbarger entered the polling place and inquired as to the number of voters who turned out. An election commissioner advised him that *W.Va. Code*, 3-1-37 forbade anyone not a voter from entering a polling place while polls were open. Another election worker refused to answer his questions concerning the vote count and asked him to leave. He refused and told a voter that he would speak to the voter outside. After remaining outside speaking to the voter, he left.

Syl. pt. 1 - "Under Rule III(C)(2) (1983 Supp.) of the *West Virginia Rules of Procedure for the Handling of Complaints Against Justices, Judges and Magistrates*, the allegations of a complaint in a judicial disciplinary proceeding 'must be proved by clear and convincing evidence.' " Syl. pt. 4, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).

Syl. pt. 2 - " ' " 'The Supreme Court of Appeals will make an independent evaluation of the record and recommendations of the Judicial [Hearing] Board in disciplinary proceedings.' Syl. pt. 1, *West Virginia Judicial Inquiry Commission v. Dostert*, 165 W.Va. 233, 271 S.E.2d 427 (W.Va. 1980)." Syllabus, *In the Matter of Gorby*, 176 W.Va. 11, 339 S.E.2d 697 (1985).' Syl. pt. 1, *In the Matter of Crislip*, 182 W.Va. 637, 391 S.E.2d 84 (1990." Syl. pt. 2, *In the Matter of Eplin*, 187 W.Va. 131, 416 S.E.2d 248 (1992).

The Court found Magistrate Harshbarger violated Canon 2A of the Code of Judicial Conduct. Public admonishment (no costs).

### Failure to find replacement

***In the Matter of Witherell***, No. 21978 (11/18/94) (Per Curiam)

Respondent was scheduled to work 8:00 p.m. to 8:00 a.m. on June 12, 1993. He did not appear, nor did he secure a replacement. Arrangements were made for another magistrate to fill the shift.

**MAGISTRATE COURT**

**Discipline** (continued)

**Failure to find replacement** (continued)

***In the Matter of Witherell***, (continued)

Respondent claimed he gave notice of his inability to work; he wrote to the chief judge advising that his doctor had told him not to work a twelve hour shift and asking that a replacement be found. The court administrator told respondent he would try to help but for respondent to procure his own replacement. Respondent testified he believed the matter was resolved and that he would take sick leave.

The Judicial Hearing Board found violations of Canon 3(A), 3(B)(1), 3(B)(8) and 3(C)(1). Public reprimand for failing to secure a replacement.

**Indictment for crime**

***In the Matter of Atkinson***, 456 S.E.2d 202 (1995) (Per Curiam)

Magistrate Atkinson was indicted on eighteen state felony and misdemeanor counts concerning bribery and receiving gifts and gratuities, along with felony tax evasion. In addition, he was also indicted for obstructing a federal investigation of another but the Court chose not to consider that charge since it was dismissed. The Judicial Investigation Commission reported that the "integrity of the legal system has been placed into question."

Syl. pt. - "Under the authority of article VIII sections 3 and 8 of the *West Virginia Constitution* and Rule II(J)(2) of the *Rules of Procedure for the Handling of Complaints Against Justices, Judges, Magistrates and Family Law Masters*, the Supreme Court of Appeals of West Virginia may suspend a judge, who has been indicted for or convicted of serious crimes, without pay, pending the final disposition of the criminal charges against the particular judge or until the underlying disciplinary proceeding before the Judicial investigation Commission has been completed." Syllabus, *In the Matter of Grubb*, 187 W.Va. 228, 417 S.E.2d 919 (1992).

**Discipline** (continued)

**Indictment for crime** (continued)

***In the Matter of Atkinson***, (continued)

The Court noted *Grubb*, *supra*, resulted in a suspension without pay pending disposition of charges. Suspension pending resolution was also ordered in *Committee on Legal Ethics v. Ikner*, 190 W.Va. 433, 438 S.E.2d 613 (1993).

The charges here seriously threaten the public's confidence in the judicial system; further, all charges raise questions about respondent's actions as a public servant. Suspension without pay.

**Polling place violation**

***In the Matter of Harshbarger***, 450 S.E.2d 667 (1994) (Per Curiam)

See MAGISTRATE COURT Discipline, Election violations, (p. 462) for discussion of topic.

**Public censure**

***In the Matter of Mendez***, 450 S.E.2d 646 (1994) (Per Curiam)

See MAGISTRATE COURT Discipline, Campaign violations, (p. 458) for discussion of topic.

**Public reprimand**

***In the Matter of Browning***, 452 S.E.2d 34 (1994) (Cleckley, J.)

See MAGISTRATE COURT Discipline, Domestic violence, (p. 459) for discussion of topic.

## MAGISTRATE COURT

**Discipline** (continued)

**Public reprimand** (continued)

***In the Matter of Witherell***, No. 21978 (11/18/94) (Per Curiam)

See MAGISTRATE COURT Discipline, Failure to find replacement, (p. 462) for discussion of topic.

**Relationship with clerk**

***In the Matter of Minigh***, No. 22665 (12/15/95) (Per Curiam)

Respondent Magistrate employed a magistrate assistant for fifteen years prior to her resignation. After her employment, respondent and the assistant became romantically involved, with the assistant living with respondent and giving birth to a child.

The Judicial Hearing Board charged respondent with violations of Canons 1, 2A and 3C(4) for employing his wife, a practice prohibited by *W.Va. Code*, 6-10-1; and having a "member of the immediate family" as his assistant. *W.Va. Code*, 50-1-9. The Board claimed respondent avoided these prohibitions by not marrying his assistant.

The Court found that no favoritism existed at the time of the clerk's hiring; there was no evidence that the subsequent relationship had any effect on the clerk's hiring, nor on the clerk's treatment during her employment. While not condoning the relationship, the Court found no violation of either statute in that the clerk is neither respondent's wife nor immediate family. Dismissed.

## MAGISTRATE COURT

### Disqualification

#### Rule of necessity

***State ex rel. Brown v. Dietrick***, 444 S.E.2d 47 (1994) (Miller, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 579) for discussion of topic.

#### Spouse is police chief

***State ex rel. Brown v. Dietrick***, 444 S.E.2d 47 (1994) (Miller, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 579) for discussion of topic.

### Ethics

***In the Matter of Browning***, 452 S.E.2d 34 (1994) (Cleckley, J.)

See MAGISTRATE COURT Discipline, Domestic violence, (p. 459) for discussion of topic.

#### Campaign violations

***In the Matter of Mendez***, 450 S.E.2d 646 (1994) (Per Curiam)

See MAGISTRATE COURT Discipline, Campaign violations, (p. 458) for discussion of topic.

### Impairment

***In the Matter of Queen***, No. 23102 (12/7/95) (Per Curiam)

See MAGISTRATE COURT Discipline, Alcoholism, (p. 458) for discussion of topic.

## MAGISTRATE COURT

### Impartiality

***State ex rel. Brown v. Dietrick***, 444 S.E.2d 47 (1994) (Miller, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 579) for discussion of topic.

### Indictment of magistrate

***In the Matter of Atkinson***, 456 S.E.2d 202 (1995) (Per Curiam)

See MAGISTRATE COURT Discipline, Indictment for crime, (p. 463) for discussion of topic.

### Judicial ethics

***In the Matter of Browning***, 452 S.E.2d 34 (1994) (Cleckley, J.)

See MAGISTRATE COURT Discipline, Domestic violence, (p. 459) for discussion of topic.

### Legal training

#### Necessity for

***State ex rel. Collins v. Bedell***, 460 S.E.2d 636 (1995) (McHugh, C.J.) (consolidated) ***State ex rel. Peeples v. Knight***, 460 S.E.2d 636 (1995) (McHugh, C.J.)

See MAGISTRATE COURT Appeal from, (p. 454) for discussion of topic.

## MAGISTRATE COURT

### Probable cause

#### Duty to determine independently

***State ex rel. Brown v. Dietrick***, 444 S.E.2d 47 (1994) (Miller, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 579) for discussion of topic.

### Public censure

***In the Matter of Mendez***, 450 S.E.2d 646 (1994) (Per Curiam)

See MAGISTRATE COURT Discipline, Campaign violations, (p. 458) for discussion of topic.

### Public reprimand

***In the Matter of Browning***, 452 S.E.2d 34 (1994) (Cleckley, J.)

See MAGISTRATE COURT Discipline, Domestic violence, (p. 459) for discussion of topic.

***In the Matter of Witherell***, No. 21978 (11/18/94) (Per Curiam)

See MAGISTRATE COURT Discipline, Failure to find replacement, (p. 462) for discussion of topic.

### Suspensions

***In the Matter of Queen***, No. 23102 (12/7/95) (Per Curiam)

See MAGISTRATE COURT Discipline, Alcoholism, (p. 458) for discussion of topic.

## MAGISTRATE COURT

### Suspension without pay

***In the Matter of Atkinson***, 456 S.E.2d 202 (1995) (Per Curiam)

See MAGISTRATE COURT Discipline, Indictment for crime, (p. 463) for discussion of topic.

### Trial *de novo*

***State ex rel. Collins v. Bedell***, 460 S.E.2d 636 (1995) (McHugh, C.J.)
(consolidated) ***State ex rel. Peeples v. Knight***, 460 S.E.2d 636 (1995) (McHugh, C.J.)

See MAGISTRATE COURT Appeal from, (p. 454) for discussion of topic.

## MALICE

### Diminished capacity to form

***State v. Bush***, 442 S.E.2d 437 (1994) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Psychological/psychiatric examination, Waiver during, (p. 606) for discussion of topic.

### Inferred from actions

***State v. Mullins***, 456 S.E.2d 42 (1995) (Fox, J.)

See AIDING AND ABETTING Principal in first and second-degree defined, (p. 20) for discussion of topic.

### Instructions on

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See INSTRUCTIONS Sufficiency of, Generally, (p. 390) for discussion of topic.

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See HOMICIDE Sufficiency of evidence, (p. 342) for discussion of topic.

### Use of deadly weapon

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See HOMICIDE Sufficiency of evidence, (p. 342) for discussion of topic.

## MANDAMUS

### Duty to rule in timely manner

***State ex rel. Carey v. Henning***, No. 22568 (12/14/94) (Per Curiam)

See JUDGES Duties, To rule in timely manner, (p. 413) for discussion of topic.

### Facilities Review Panel

#### Access to facilities

***State ex rel. Juvenile Justice Committee v. Lewis***, No. 23006 (10/13/95) (Per Curiam)

See JUVENILES Facilities Review Panel, Access to facilities, (p. 437) for discussion of topic.

### Habeas corpus

#### To compel ruling

***State ex rel. Lynch v. MacQueen***, No. 22469 (10/18/94) (Per Curiam)

See JUDGES Duties, To rule in timely manner, (p. 414) for discussion of topic.

***State ex rel. Proctor v. Steptoe***, No. 22141 (5/20/94) (Per Curiam)

See JUDGES Duties, To rule in timely manner, (p. 414) for discussion of topic.

**MANDAMUS**

**Prison/jail conditions**

**Medical treatment**

***State ex rel. Carey v. Henning***, No. 22568 (12/14/94) (Per Curiam)

See JUDGES Duties, To rule in timely manner, (p. 413) for discussion of topic.

**Ruling by court**

**To compel**

***State ex rel. Proctor v. Steptoe***, No. 22141 (5/20/94) (Per Curiam)

See JUDGES Duties, To rule in timely manner, (p. 414) for discussion of topic.

**Transcript**

**Court reporter to produce**

***State ex rel. Cajero v. Edwards***, No. 22138 (4/18/94) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 689) for discussion of topic.

***State ex rel. Garrett v. Lawson***, No. 22264 (6/16/94) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 689) for discussion of topic.

***State ex rel. Hemingway v. Edwards***, No. 22437 (10/6/94) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 691, 692) for discussion of topic.

**Transcript** (continued)

**Court reporter to produce** (continued)

***State ex rel. Lopez v. Edwards***, No. 22262 (6/15/94) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 692) for discussion of topic.

***State ex rel. Nazelrod v. Edwards***, No. 22047 (2/14/94) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 691, 692) for discussion of topic.

***State ex rel. Shane v. Edwards***, No. 22483 (10/6/94) (Per Curiam)

See TRANSCRIPTS Right to, Failure to produce, (p. 693) for discussion of topic.

## MARITAL PRIVILEGE

### Defined

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Marital communications, (p. 239) for discussion of topic.

## MEDICAL CARE

### Penitentiary's responsibility

***Wilson v. Hun***, 457 S.E.2d 662 (1995) (Per Curiam)

See PRISON/JAIL CONDITIONS  Medical care, (p. 522) for discussion of topic.

**MENTAL HYGIENE**

**Competency**

**Standard for**

***State ex rel. Shamblin v. Collier***, 445 S.E.2d 736 (1994) (Workman, J.)

See COMPETENCY  Standard for, (p. 147) for discussion of topic.

## *MIRANDA* RIGHTS

### Juveniles

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See JUVENILE Self-incrimination, Waiver of right to counsel, (p. 447) for discussion of topic.

## *MIRANDA* WARNINGS

### Confessions

#### Admissibility of

***State v. Farley***, 452 S.E.2d 50 (1994) (Cleckley, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 599) for discussion of topic.

### Non-custodial interrogation

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 597) for discussion of topic.

### Security guards

#### Necessary to give

***State v. Hopkins***, 453 S.E.2d 317 (1994) (Neely, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 602) for discussion of topic.

### Voluntariness of confessions

***State v. Jones***, 456 S.E.2d 459 (1995) (Cleckley, J.)

See SELF-INCRIMINATION Statements by defendant, (p. 594) for discussion of topic.

## MUNICIPAL OFFENSES

### Appointment not required

***State ex rel. Kees v. Sanders***, 453 S.E.2d 436 (1994) (McHugh, J.)

See APPOINTED COUNSEL Municipal offenses, (p. 44) for discussion of topic.

**MURDER**

**Attempt**

**Elements of**

***State v. Mayo***, 443 S.E.2d 236 (1994) (Miller, J.)

See HOMICIDE Attempted murder, (p. 332) for discussion of topic.

**Corpus delicti**

**Proof of**

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

See HOMICIDE Corpus delicti, Proof of, (p. 333) for discussion of topic.

**Felony-murder**

**Sufficiency of indictment**

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

See HOMICIDE Indictment, Sufficiency of, (p. 336) for discussion of topic.

**First-degree**

**Diminished capacity**

***State v. Bush***, 442 S.E.2d 437 (1994) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Psychological/psychiatric examination, Waiver during, (p. 606) for discussion of topic.

**MURDER**

**First-degree** (continued)

**Principal in second-degree**

***State v. Jones***, 456 S.E.2d 459 (1995) (Cleckley, J.)

See SELF-INCRIMINATION Statements by defendant, (p. 594) for discussion of topic.

***State v. Mullins***, 456 S.E.2d 42 (1995) (Fox, J.)

See AIDING AND ABETTING Principal in first and second-degree defined, (p. 20) for discussion of topic.

**Indictment**

**Sufficiency of**

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

See HOMICIDE Indictment, Sufficiency of, (p. 336) for discussion of topic.

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See INSTRUCTIONS Murder, (p. 387) for discussion of topic.

**Sufficiency of evidence**

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See HOMICIDE Sufficiency of evidence, (p. 342) for discussion of topic.

***State v. Kirkland***, 447 S.E.2d 278 (1994) (Workman, J.)

See SUFFICIENCY OF EVIDENCE Generally, (p. 663) for discussion of topic.

## MURDER

### Instructions

#### Malice

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See HOMICIDE Sufficiency of evidence, (p. 342) for discussion of topic.

#### Premeditation

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See HOMICIDE Instructions, (p. 336) for discussion of topic.

#### Shifting burden of proof

***State v. Richards***, 466 S.E.2d 395 (1995) (Per Curiam)

See PLAIN ERROR Generally, (p. 503) for discussion of topic.

#### Sufficiency of

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See INSTRUCTIONS Murder, (p. 387) for discussion of topic.

### Intent

#### Voluntary intoxication

***State v. Bush***, 442 S.E.2d 437 (1994) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Psychological/psychiatric examination, Waiver during, (p. 606) for discussion of topic.

**MURDER**

**Kidnaping incidental to**

***State v. Farmer***, 445 S.E.2d 759 (1994) (Per Curiam)

See KIDNAPING Incidental to another offense, (p. 452) for discussion of topic.

**Malice**

**Inferred from actions**

***State v. Mullins***, 456 S.E.2d 42 (1995) (Fox, J.)

See AIDING AND ABETTING Principal in first and second-degree defined, (p. 20) for discussion of topic.

**Sufficiency of evidence**

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See HOMICIDE Sufficiency of evidence, (p. 342) for discussion of topic.

**Principal in second-degree**

***State v. Jones***, 456 S.E.2d 459 (1995) (Cleckley, J.)

See SELF-INCRIMINATION Statements by defendant, (p. 594) for discussion of topic.

***State v. Mullins***, 456 S.E.2d 42 (1995) (Fox, J.)

See AIDING AND ABETTING Principal in first and second-degree defined, (p. 20) for discussion of topic.

## MURDER

### Self-defense

***State v. McClanahan***, 454 S.E.2d 115 (1994) (Per Curiam)

See SELF-DEFENSE Burden of proof, Prosecution's after prima facie, (p. 593) for discussion of topic.

### Sentencing

#### Duty to instruct on mercy

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See SENTENCING Murder, Duty to instruct on mercy, (p. 630) for discussion of topic.

### Sufficiency of evidence

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See APPEAL Sufficiency of evidence, Generally, (p. 39) for discussion of topic.

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See HOMICIDE Sufficiency of evidence, (p. 342) for discussion of topic.

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

See HOMICIDE Sufficiency of evidence, (p. 336) for discussion of topic.

#### Malice

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See HOMICIDE Sufficiency of evidence, (p. 342) for discussion of topic.

## NEGLIGENT HOMICIDE

### Sufficiency of evidence

***State v. Linkous***, 460 S.E.2d 288 (1995) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Negligent homicide, (p. 668) for discussion of topic.

## NEW TRIAL

### Newly discovered evidence

#### Sufficient for new trial

***State v. Crouch***, 445 S.E.2d 213 (1994) (Neely, J.)

Appellant was convicted of first-degree murder without mercy. Following affirmance of the conviction, it came to light that the investigating officer who had taken appellant's confession had two bad check warrants against her; a sheriff's secretary was told to alter the Criminal Investigation Bureau report showing the warrants.

Appellant moved for a new trial. The supervising officer denied directing alteration of the record; the arresting officer testified as to the charges; but the CIB officer testified that expungement of the record could not have taken place because the officer had never had a CIB file.

At the same hearing wherein the motion for new trial was heard, the issue of the voluntariness of appellant's confession was relitigated. The statement was given to the officer before appellant had a chance to have a lawyer appointed as he requested. The court found the confession to result from a conversation appellant initiated.

Finally, appellant claimed the prosecution withheld exculpatory evidence regarding appellant's competence to stand trial. The trial court ruled the evidence was not withheld and denied the motion for new trial.

Syl. pt. 1 - " 'A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the

**NEW TRIAL**

**Newly discovered evidence** (continued)

**Sufficient for new trial** (continued)

***State v. Crouch***, (continued)

opposite side.' Syllabus, *State v. Frazier*, 162 W.Va. 935, 253 S.E.2d 534 (1979), *quoting*, Syl. pt. 1, *Halstead v. Horton*, 38 W.Va. 727, 18 S.E. 953 (1894). Syl. Pt. 1, *State v. King*, 173 W.Va. 164, 313 S.E.2d 440 (1984)." Syl. Pt. 1, *State v. O'Donnell*, 189 W.Va. 628, 433 S.E.2d 566 (1993).

Here, the newly-discovered evidence was deemed by the trial court to be either incredible; or that due diligence was not used to obtain it before trial (the alleged exculpatory evidence); or that the result would not have changed (the alleged incompetence). No error.

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

Appellant was convicted of first-degree murder. Subsequent to the trial a witness came forward claiming to have seen appellant and his co-defendant in a different area at the time of the crime.

Syl. pt. 12 - " 'A new trial will not be granted on the ground of newly-discovered evidence unless the case comes within the following rules: (1) The evidence must appear to have been discovered since the trial, and, from the affidavit of the new witness, what such evidence will be, or its absence satisfactorily explained. (2) It must appear from the facts stated in his affidavit that plaintiff was diligent in ascertaining and securing his evidence, and that the new evidence is such that due diligence would not have secured it before the verdict. (3) Such evidence must be new and material, and not merely cumulative; and cumulative evidence is additional evidence of the same kind to the same point. (4) The evidence must be such as ought to produce an opposite result at a second trial on the merits. (5) And the new trial will generally be refused when the sole object of the new evidence is to discredit or impeach a witness on the opposite side.' Syllabus, *State v. Frazier*, 162 W.Va. 935, 253 S.E.2d 534 (1979), *quoting*, Syl. pt. 1, *Halstead v. Horton*, 38 W.Va. 727, 18 S.E. 953 (1894)." Syl. Pt. 1, *State v. King*, 173 W.Va. 164, 313 S.E.2d 440 (1984).

**NEW TRIAL**

**Newly discovered evidence** (continued)

**Sufficient for new trial** (continued)

***State v. Satterfield***, (continued)

Syl. pt. 13 - " 'A new trial on the ground of after-discovered evidence or newly discovered evidence is very seldom granted and the circumstances must be unusual or special.' Syllabus Point 9, *State v. Hamric*, 151 W.Va. 1, 151 S.E.2d 252 (1966)." Syl. pt. 2, *State v. King*, 173 W.Va. 164, 313 S.E.2d 440 (1984).

The Court found the newly-discovered witness to be insufficient to have produced a different result. No error.

**NOTICE**

**Sufficiency of**

**Amended indictment**

***State v. Adams***, 456 S.E.2d 4 (1995) (Cleckley, J.)

See INDICTMENT Sufficiency of, Amendment by grand jury, (p. 356) for discussion of topic.

**OBJECTIONS**

**Sustained**

**Effect of**

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See INSTRUCTIONS  Curative, Effect of, (p. 380) for discussion of topic.

## PATERNITY

### Acknowledgment of

***State ex rel. David Allen B. v. Sommerville***, 459 S.E.2d 363 (1995) (Recht, J.)

See PATERNITY Blood tests, When required, (p. 495) for discussion of topic.

### Acknowledgment of in adoption

***Chrystal R.M. v. Charlie A.L.***, 459 S.E.2d 415 (1995) (Miller, J.)

By agreement appellant, the birth mother, stated that she would allow adoption of her child and named a third person to this action to be the father. Appellee here, Charlie A.L., was found to be the father pursuant to blood tests. Appellant filed suit asking for child support, reimbursement of expenses and attorney's fees.

Appellee claimed the acknowledgment previously executed met the requirements of *W.Va. Code*, 48A-6-6(b) and established the third party as the father. The family law master ruled this section was never intended to cover adoption agreements. The circuit court reversed.

Syl. pt. 1 - Where the issue on an appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review.

Syl. pt. 2 - "Statutes relating to different subjects are not in pari materia. Syllabus point 5, *Commercial Credit Corp. v. Citizens National Bank*, 148 W.Va. 198, 133 S.E.2d 720 (1963)." Syllabus point 1, *Atchinson v. Erwin*, 172 W.Va. 8, 302 S.E.2d 78 (1983).

Syl. pt. 3 - Statements by the natural mother in an adoption agreement that the adoptive father acknowledges paternity, when the adoption agreement is subsequently not consummated, does not constitute an acknowledgment of paternity under *W.Va. Code*, 48A-6-6(b) (1990). Therefore, such statements do not bar a proceeding on her part against the actual biological father to establish paternity.

## PATERNITY

### Acknowledgment of in adoption (continued)

***Chrystal R.M. v. Charlie A.L.***, (continued)

Syl. pt. 4 - "Under *W.Va. Code*, 48A-6-3 (1992), undisputed blood or tissue test results indicating a statistical probability of paternity of more than ninety-eight percent are conclusive on the issue of paternity, and the circuit court should enter judgment accordingly." Syllabus point 5, *Mildred L.M. v. John O.F.*, 192 W.Va. 345, 452 S.E.2d 436 (1994).

The Court found the contract of adoption was not executed. Therefore, *Wyatt v. Wyatt*, 185 W.Va. 472, 408 S.E.2d 51 (1991) was inapplicable (duty to support basic duty owed by parent, cannot be alienated by contract).

Further, the purpose of *W.Va. Code*, 48A-6-6(b) is to allow for acknowledgment of paternity without the cumbersome process of proving paternity; the adoption provisions of *W.Va. Code*, 48-4-1 were never meant to be read in pari materia.

Finally, *W.Va. Code*, 48-6-6(b) should not be used to thwart rights of a natural father (here, responsibilities). The natural father has a constitutional right to notice of termination of his rights. A simple acknowledgment cannot abridge that right. Reversed and remanded.

### Blood tests

#### When conclusive

***Mildred L.M. v. John O.F.***, 452 S.E.2d 436 (1994) (Cleckley, J.)

Plaintiff filed a Uniform Reciprocal Enforcement of Support Act petition against defendant. At trial it was shown that plaintiff had sex with a Robert C. in July 1987; she abstained until she had sex with the defendant in November 1987. After a three-week relationship, she resumed sex with Robert C. on or about 7 December 1987. During December, 1987 plaintiff discovered she was pregnant. The test results showed that Robert C. could not be the child's father because they had not had sex during the estimated time of conception; blood tests confirmed this estimate. Tests further showed a "99.14%" probability that the defendant was the father according to expert testimony.

**PATERNITY**

**Blood tests** (continued)

**When conclusive** (continued)

***Mildred L.M. v. John O.F.***, (continued)

Defendant did not challenge either the expert's qualifications or the test results. Plaintiff's counsel moved for directed verdict, which motion was denied. The jury returned a verdict for the defendant; plaintiff's motion for judgment n.o.v. was also denied.

Syl. pt. 1 - In reviewing a trial court's ruling on a motion for a judgment notwithstanding the verdict, it is not the task of the appellate court reviewing facts to determine how it would have ruled on the evidence presented. It's task is to determine whether the evidence was such that a reasonable trier of fact might have reached the decision below. Thus, in ruling on a motion for a judgment not withstanding the verdict, the evidence must be viewed in the light most favorable to the nonmoving party. If on review, the evidence is shown to be legally insufficient to sustain the verdict, it is the obligation of this Court to reverse the circuit court and to order judgment for the appellant.

Syl. pt. 2 - " 'In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.' Syl. pt. 5, *Orr v. Crowder*, 173 W.Va. 335, 315 S.E.2d 593 (1983), *cert. denied*, 469 U.S. 981, 105 S.Ct. 384, 83 L.Ed.2d 319 (1984)." Syllabus Point 6, *McClung v. Marion County Comm'n*, 178 W.Va. 444, 360 S.E.2d 221 (1987).

Syl. pt. 3 - Although a jury is not bound to accept expert testimony and should evaluate an expert witness as it would any other witness, the jury is not free to reject uncontradicted scientific testimony and to substitute its own speculation in its place. In cases where expert testimony is uncontradicted and the jury rejects it, there must be ample other testimony reasonably supporting the jury's verdict.

**PATERNITY**

**Blood tests** (continued)

**When conclusive** (continued)

***Mildred L.M. v. John O.F.***, (continued)

Syl. pt. 4 - Where the foundation is sufficient to show by a preponderance of the evidence the proper testing procedures were employed and the expert witness who interpreted the test results was qualified, courts may take judicial notice of the accuracy and reliability of HLA blood-tissue test results in paternity cases that are introduced pursuant to *W.Va. Code*, 48A-6-3 (1992).

Syl. pt. 5 - Under *W.Va. Code*, 48A-6-3 (1992), undisputed blood or tissue test results indicating a statistical probability of paternity of more than ninety-eight percent are conclusive on the issue of paternity, and the circuit court should enter judgment accordingly.

Syl. pt. 6 - " 'When, upon the trial of a case, the evidence decidedly preponderates against the verdict of a jury or the finding of a trial court upon the evidence, this Court will upon review, reverse the judgment; and, if the case was tried by the court in lieu of a jury, this Court will make such finding and render such judgment on the evidence as the trial court should have made and rendered.' Syllabus Point 9, *Bluefield Supply Co. v. Frankel's Appliances, Inc.*, 149 W.Va. 622, 142 S.E.2d 898 (1965)." Syllabus Point 5, *Estate of Bayliss by Bowles v. Lee*, 173 W.Va. 299, 315 S.E.2d 406 (1984).

The Court noted that 1992 amendments to *W.Va. Code*, 48A-6-3(a) to deem undisputed tests showing a likelihood of more than 98% would have established paternity here; the petition here was filed before the amendments became effective. The Court expressed concern that the amended statute was not used since the hearing was held after the effective date. The Court concluded that the rights created by the amendment were remedial and procedural, thus not subject to the presumption against retroactive application. *Bradley v. Richmond School Board*, 416 U.S. 696, 94 S.Ct. 2006, 40 L.Ed.2d 476 (1974); *Pannel v. Inco Alloys Intl. Inc.*, 188 W.Va. 76, 422 S.E.2d 643 (1992); *Loveless v. State Workmen's Comp.*, 155 W.Va. 264, 184 S.E.2d 127 (1971). In future, any *undisputed* tests showing more than 98% probability must be given conclusive weight.

**PATERNITY**

**Blood tests** (continued)

**When conclusive** (continued)

***Mildred L.M. v. John O.F.***, (continued)

Even without the statute here, however, paternity was established as a matter of law. "For a court to declare that these tests are not conclusive would be as unrealistic as it would be for a court to declare that the world is flat." *Ross v. Marx*, 21 N.J. Super., __, 95, 90 A.2d 545, 546 (1952).

The Court noted that evidence showing two men could have fathered the child, evidence that the plaintiff was infertile or evidence discrediting plaintiff's credibility would have been sufficient for the jury to reject the expert tests and testimony. Here, defendant even conceded the sexual acts. Reversed.

**When required**

***State ex rel. David Allen B. v. Sommerville***, 459 S.E.2d 363 (1995) (Recht, J.)

Petitioner sought a writ of prohibition to prevent a DNA blood test to determine paternity. Petitioner had originally initiated the proceeding to establish paternity; the test was requested by the maternal grandparents to disprove paternity. The grandparents were parties to the original petition so as to establish visitation rights.

The circuit court, without objection from any party, interviewed the child out of the presence of any of the parties. The court concluded the child wanted to live with petitioner. The court also took judicial notice that DHHR had initiated child support proceedings against petitioner to establish paternity and support obligations and that the mother (now dead) had stated under oath that petitioner was the father.

Despite finding that petitioner was the father, the court also ordered the DNA blood test.

**PATERNITY**

**Blood tests** (continued)

**When required** (continued)

***State ex rel. David Allen B. v. Sommerville***, (continued)

Syl. pt. 1 - "A trial judge should refuse to admit blood test evidence which would disprove paternity when the individual attempting to disestablish paternity has held himself out to be the father of the child for a sufficient period of time such that disproof of paternity would result in undeniable harm to the child." Syl. pt. 3, *Michael K.T. v. Tina K.T.*, 182 W.Va. 399, 387 S.E.2d 866 (1989).

Syl. pt. 2 - Once a man and woman properly acknowledge that the man is the father of a child under *W.Va. Code*, 48A-6-(b) (1990), then absent a challenge to that acknowledgment by a person with standing to challenge the acknowledgment, no blood testing shall be required to disestablish paternity.

Syl. pt. 3 - While an alleged biological parent has standing to challenge the paternity established pursuant to *W.Va. Code*, 48-6-6(b) (1990), that same right is not vested in a grandparent of the child.

Syl. pt. 4 - "In a contest involving the custody of an infant the welfare of the child is the polar star by which the discretion of the court will be guided." Syl. pt. 1, *State ex rel. Cash v. Lively*, 155 W.Va. 801, 187 S.E.2d 601 (1972).

The Court noted that testing here was superfluous. The Court noted that under *Michael K.T.*, *supra*, petitioner would not have been permitted to use blood tests to disclaim paternity so it was unreasonable to require him to submit to testing to establish paternity.

Because the grandparents here raised questions regarding petitioner's parental fitness (alleging child abuse), the Court noted that establishing paternity in no way established fitness. Remanded with directions to explore the fitness issue. Writ granted.

## PATERNITY

### Determination of

#### Pursuant to RURESA

***State ex rel. Cline v. Pentasuglia***, 457 S.E.2d 644 (1995) (Workman, J.)

Virginia sought establishment of paternity under the Revised Uniform Reciprocal Enforcement of Support Act (RURESA), *W.Va. Code*, 48A-7-1, *et seq*. The court dismissed, finding a prior decree of divorce declared the ex-husband the father. The mother stated in answer to an interrogatory that respondent was actually the father.

Petitioner here, the state of West Virginia, alleged that the child was not a party and is therefore not barred. No blood tests or other evidence of paternity was admitted.

Syl. pt. 1 - "The dismissal with prejudice of a paternity action initiated by a mother against a putative father of a child does not preclude the child, under the principle of *res judicata*, from bringing a second action to determine paternity when the evidence does not show privity between the mother and the child in the original action nor does the evidence indicate that the child was either a party to the original action or represented by counsel or *guardian ad litem* in that action." Syl. Pt. 5, *State ex rel. Division of Human Services v. Benjamin P.B.*, 183 W.Va. 220, 395 S.E.2d 220 (1990).

Syl. pt. 2 - The Revised Uniform Reciprocal Enforcement of Support Act, West Virginia Code §§ 48A-7-1 to -41 (1995), enables an obligee in one state to establish the paternity of an obligor in this State.

Syl. pt. 3 - Under West Virginia Code § 48A-7-26 (1995), a circuit court in a RURESA proceeding in this state may adjudicate the issue of paternity if each of the following three statutory elements are satisfied: (1) the obligor asserts a defense that he is not the father of the child involved; (2) the circuit court concludes that the defense is not frivolous; and (3) the parties are present at the hearing or the proof required in the case indicates that the presence of either or both of the parties is not necessary.

**PATERNITY**

**Determination of** (continued)

**Pursuant to RURESA** (continued)

***State ex rel. Cline v. Pentasuglia***, (continued)

Syl. pt. 4 - Prior to adjourning a paternity hearing under West Virginia Code § 48A-7-26 (1995), a circuit court must, at a minimum, order appropriate blood grouping tests to aid (1) in determining parentage; and (2) in determining whether the physical presence of the relevant parties is required.

Syl. pt. 5 - Where the blood grouping tests in a paternity proceeding under West Virginia Code § 48A-7-26 are inconclusive, the circuit court (1) should consider the equities, convenience and justice to the parties; and (2) should determine whether to adjourn the matter to allow for a determination of paternity in a separate proceeding with all relevant parties present. In making this determination, however, the circuit court should consider, inter alia, (1) the Revised Uniform Reciprocal Enforcement of Support Act's goal of furnishing a liberal, speedy and efficient enforcement mechanism for duties of support; and (2) the possibility of taking additional evidence via deposition pursuant to West Virginia Code § 48A-7-20 (1995).

Syl. pt. 6 - The Revised Uniform Reciprocal Enforcement of Support Act may be employed to determine and enforce the duty of a parent to support his or her minor children even though there exists no prior judicial order of support.

Syl. pt. 7 - "Upon a judicial determination of paternity, the paternal parent shall be required to support his child under *W.Va. Code*, 48A-6-4 (1986), and may also be liable for reimbursement support from the date of birth of the child." Syl. Pt. 2, in part, *Kathy L.B. v. Patrick J.B.*, 179 W.Va. 655, 371 S.E.2d 583 (1988).

The Court found no privity between mother and child here, thus the divorce action is not *res judicata* as to support matters. The Court took the opportunity to clarify available remedies under RURESA, noting that enforcement of support does not necessarily depend on a pre-existing support order in another state; the respondent state can establish its own order.

**PATERNITY**

**Determination of** (continued)

**Pursuant to RURESA** (continued)

***State ex rel. Cline v. Pentasuglia***, (continued)

**NOTE**: Effective 10 June 1995, Public Defender Services no longer pays for paternity defense. Cases appointed prior to that date will be honored.

**Interstate determination**

***State ex rel. Cline v. Pentasuglia***, 457 S.E.2d 644 (1995) (Workman, J.)

See PATERNITY Determination of, Pursuant to RURESA, (p. 497) for discussion of topic.

**RURESA allows support**

***State ex rel. Cline v. Pentasuglia***, 457 S.E.2d 644 (1995) (Workman, J.)

See PATERNITY Determination of, Pursuant to RURESA, (p. 497) for discussion of topic.

**Standing to contest**

**Grandparents**

***State ex rel. David Allen B. v. Sommerville***, 459 S.E.2d 363 (1995) (Recht, J.)

See PATERNITY Blood tests, When required, (p. 495) for discussion of topic.

## PENALTIES

### Enhancement

#### Notice of

***State v. McClanahan***, 454 S.E.2d 115 (1994) (Per Curiam)

See SENTENCING Enhancement, Use of a firearm, (p. 620) for discussion of topic.

#### Use of a firearm

***State v. McClanahan***, 454 S.E.2d 115 (1994) (Per Curiam)

See SENTENCING Enhancement, Use of a firearm, (p. 620) for discussion of topic.

## PHOTOGRAPHS

### Admissibility

***State v. Derr***, 451 S.E.2d 731 (1994) (Cleckley, J.)

See EVIDENCE Admissibility, Photographs, (p. 243) for discussion of topic.

## PLAIN ERROR

### Defined

***State ex rel. Morgan v. Trent***, 465 S.E.2d 257 (1995) (Miller, J.) (consolidated) ***Dean v. Duncil***, 465 S.E.2d 257 (1995) (Miller, J.)

See SEXUAL ATTACKS Sexual assault, Victim's age, (p. 643) for discussion of topic.

***State v. Miller***, 459 S.E.2d 114 (1995) (Cleckley, J.)

See INSTRUCTIONS Failure to offer, (p. 382) for discussion of topic.

***State v. Wood***, 460 S.E.2d 771 (1995) (McHugh, C.J.)

See EVIDENCE Witnesses, Reputation for truthfulness, (p. 292) for discussion of topic.

### Effect of

***State ex rel. Morgan v. Trent***, 465 S.E.2d 257 (1995) (Miller, J.) (consolidated) ***Dean v. Duncil***, 465 S.E.2d 257 (1995) (Miller, J.)

See SEXUAL ATTACKS Sexual assault, Victim's age, (p. 643) for discussion of topic.

### Elements of

***State v. Miller***, 459 S.E.2d 114 (1995) (Cleckley, J.)

See INSTRUCTIONS Failure to offer, (p. 382) for discussion of topic.

## PLAIN ERROR

### Forfeiture and waiver distinguished

***State v. Miller***, 459 S.E.2d 114 (1995) (Cleckley, J.)

See INSTRUCTIONS Failure to offer, (p. 382) for discussion of topic.

### Generally

***State v. Garrett***, 466 S.E.2d 481 (1995) (McHugh, C.J.)

See EVIDENCE Expert witnesses, Admissibility of opinion, (p. 274) for discussion of topic.

***State v. Mayo***, 443 S.E.2d 236 (1994) (Miller, J.)

See HOMICIDE Attempted murder, (p. 332) for discussion of topic.

***State v. Richards***, 466 S.E.2d 395 (1995) (Per Curiam)

Appellant was convicted of second-degree murder. At trial appellant claimed accidental shooting. The court instructed the jury that malice and intent may be inferred from use of a deadly weapon, improperly shifting the burden of proof to the defense to prove excuse, justification or provocation.

Another instruction directed the jury to find that if the defendant had no specific intent to kill the victim, then the jury could not find first-degree murder; a similar instruction was given relating to voluntary man-slaughter. Appellant claimed these instructions directed a verdict with regard to the shooting and that the defendant was the perpetrator. Trial counsel raised no objection, even when pointedly asked by the court.

**PLAIN ERROR**

**Generally** (continued)

***State v. Richards***, (continued)

Syl. pt. 1 - "The Plain error doctrine contained in Rule 30 and Rule 52(b) of the *West Virginia Rules of Criminal Procedure* is identical. It enables this Court to take notice of error, including instructional error occurring during the proceedings, even though such error was not brought to the attention of the trial court. However, the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result." Syllabus point 4, *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988).

Syl. pt. 2 - "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syllabus point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

The Court found the instructions here sufficient to avoid application of the plain error review. The trial court explicitly instructed the jury carefully on the state's burden, presumptions of innocence, reasonable doubt and not making a finding based on conjecture or suspicion. While the instructions complained of, when taken out of context, did appear to shift the state's burden of proof, the other instructions overbalanced any error. No plain error.

**Polygraph tests**

**Mention of**

***State v. Chambers***, 459 S.E.2d 112 (1995) (Neely, J.)

See EVIDENCE Polygraph tests, Reference to inadmissible, (p. 286) for discussion of topic.

**PLAIN ERROR**

**Waiver and forfeiture distinguished**

***State ex rel. Morgan v. Trent***, 465 S.E.2d 257 (1995) (Miller, J.) (consolidated) ***Dean v. Duncil***, 465 S.E.2d 257 (1995) (Miller, J.)

See SEXUAL ATTACKS Sexual assault, Victim's age, (p. 643) for discussion of topic.

***State v. Miller***, 459 S.E.2d 114 (1995) (Cleckley, J.)

See INSTRUCTIONS Failure to offer, (p. 382) for discussion of topic.

## PLEA BARGAIN

### Acceptance of

***State v. Lewis***, 447 S.E.2d 570 (1994) (Workman, J.)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 618) for discussion of topic.

### Rules governing

***State ex rel. Brewer v. Starcher***, 465 S.E.2d 185 (1995) (Cleckley, J.)

See PLEA BARGAIN Acceptance of, Rules governing, (p. 506) for discussion of topic.

***State ex rel. Brewer v. Starcher***, 465 S.E.2d 185 (1995) (Cleckley, J.)

Relator sought a writ of prohibition to prevent addition of terms to a plea agreement negotiated pursuant to Rule 11(e)(1)(C) of the *Rules of Criminal Procedure*. Relator pled guilty to wanton endangerment using a firearm. The prosecution agreed to dismiss an unlawful assault charge and *nolle* an indictment charging relator's brother with aiding and abetting both felonies. Relator's maximum sentence was set at one year in the county jail, with possibility of a fine. Relator agreed to restitution of his victim's medical expenses and the prosecution agreed not to oppose a work release program if relator made a good faith effort to cooperate with law enforcement.

Respondent's first order noted that relator had entered into the agreement but that final sentencing was the court's decision. At a later hearing respondent sentenced relator to one year in the county jail and a $2,500 fine, plus costs. Relator was to be eligible for work release and upon employment, to send his pay to the circuit clerk who would pay half for restitution.

**PLEA BARGAIN**

**Acceptance of** (continued)

**Rules governing** (continued)

***State ex rel. Brewer v. Starcher***, (continued)

Subsequently, although the written order followed respondent's oral direction, respondent rejected the order and further ordered relator to pay $5,000 for the victim's pain and suffering in addition to the $2,500 fine and restitution for medical expenses. Restitution was to be not just fifty percent of relator's income, but a minimum of $400. Upon another hearing respondent gave relator three options: (1) withdraw the plea and proceed to trial; (2) accept the amended order; or (3) appeal the issues. Relator files for this writ of prohibition, objecting to the $5,000 for pain and suffering on the grounds that it violated a binding plea agreement and deprived relator of due process, in that relator nor his counsel were present when the modification was made.

Syl. pt. 1 - Cases involving plea agreements allegedly breached by either the prosecution or the circuit court present two separate issues for appellate consideration: one factual and the other legal. First, the factual findings that undergird a circuit court's ultimate determination are reviewed only for clear error. These are the factual questions as to what the terms of the agreement were and what was the conduct of the defendant, prosecution, and the circuit court. If disputed, the factual questions are to be resolved initially by the circuit court, and these factual determinations are reviewed under the clearly erroneous standard. Second, in contrast, the circuit court's articulation and application of legal principles is scrutinized under a less deferential standard. It is a legal question whether specific conduct complained about breached the plea agreement. Therefore, whether the disputed conduct constitutes a breach is a question of law that is reviewed *de novo*.

Syl. pt. 2 - There is no absolute right under either the *West Virginia* or the *United States Constitutions* to plea bargain. Therefore, a circuit court does not have to accept every constitutionally valid guilt plea merely because a defendant wishes so to plead.

**PLEA BARGAIN**

**Acceptance of** (continued)

**Rules governing** (continued)

***State ex rel. Brewer v. Starcher***, (continued)

Syl. pt. 3 - Although the parties in criminal proceedings have broad discretion in negotiating the terms and conditions of a plea agreement, this discretion must be permissible under the *West Virginia Rules of Criminal Procedure*. Similarly, the decision whether to accept or reject a plea agreement is vested almost exclusively with the circuit court.

Syl. pt. 4 - Once a circuit court unconditionally accepts on the record a plea agreement under Rule 11(e)(1)(C) of the West Virginia Rules of Criminal Procedure, the circuit court is without authority to vacate the plea and order reinstatement of the original charge. Furthermore, after a defendant is sentenced on the record in open court, unilateral modification of the sentencing decision by the circuit court is not an option contemplated within Rule 11(e)(1)(C).

Syl. pt. 5 - A circuit court has no authority to vacate or modify, *sua sponte*, a validly accepted guilty plea under Rule 11(e)(1)(C) of the West Virginia Rules of Criminal Procedure because of subsequent events that do not impugn the validity of the original plea agreement.

Syl. pt. 6 - If proven, a charge of fraud or misrepresentation poses a serious threat to the integrity of judicial proceedings. Therefore, the "fraud exception" is adopted as a necessary rule to enhance the administration of justice. This exception is aimed at penalizing deceitful behavior engaged in during the negotiating of a plea agreement, in its presentation to the court, or in its execution by the defendant.

Syl. pt. 7 - As provided by Rule 11(h) of the West Virginia Rules of Criminal Procedure, a violation of Rule 11 does not necessarily require automatic reversal or vacatur. Rather, when a defendant claims that a circuit court failed to comply with Rule 11, a straightforward, two-step harmless error analysis must be conducted: (1) Did the circuit court in fact vary from the procedures required by Rule 11, and (2) if so, did such variance affect substantial rights of the defendant?

**PLEA BARGAIN**

**Acceptance of** (continued)

**Rules governing** (continued)

***State ex rel. Brewer v. Starcher***, (continued)

Syl. pt. 8 - There are two possible remedies for a broken plea agreement - specific performance of the plea agreement or permitting the defendant to withdraw his plea. A major factor in choosing the appropriate remedy is the prejudice caused to the defendant.

The clearly erroneous standard for review of factual findings was articulated under *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994); the *de novo* review of legal questions was set forth in *Tennant v. Marion Health Care Foundation*, 194 W.Va. 97, 459 S.E.2d 374 (1995). The cases here did not involve disputed facts.

Also, plea bargains are clearly a matter of grace, not right. *Mabry v. Johnson*, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984). Clearly, a trial judge has discretion to refuse a plea, within constitutional limits. *Tucker v. Holland*, 174 W.Va. 409, 327 S.E.2d 388 (1985); *State v. Whitt*, 183 W.Va. 286, 395 S.E.2d 530 (1990).

However, unilateral modification of a plea agreement, in violation of Rule 11 is unacceptable. A plea agreement is subject to enforcement under contract law. *State ex rel. Rogers v. Steptoe*, 177 W.Va. 6, 350 S.E.2d 7 (1986). Absent justification under the fraud exception, the circuit court was wrong in its action. When a Rule 11(e)(1)(C) plea is negotiated, as here, the circuit court must either accept or reject the agreement (or defer ruling). Further, the court may not accept a guilty plea and enter a different sentence. *State ex rel. Forbes v. Kaufman*, 185 W.Va. 72, 404 S.E.2d 763 (1991); *U.S. v. Aguilar*, 884 F.Supp. 88 (E.D.N.Y. 1995).

Writ granted; respondent disqualified; remanded for further development of the fraud issue.

**PLEA BARGAIN**

**Fraud on the court**

***State ex rel. Brewer v. Starcher***, 465 S.E.2d 185 (1995) (Cleckley, J.)

See PLEA BARGAIN Acceptance of, Rules governing, (p. 506) for discussion of topic.

**Judge's participation**

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See PROPORTIONALITY Appropriateness of sentence, Juveniles, (p. 540) for discussion of topic.

**Juveniles**

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See PROPORTIONALITY Appropriateness of sentence, Juveniles, (p. 540) for discussion of topic.

**Rejection of**

**Discretion of judge**

***State v. Lewis***, 447 S.E.2d 570 (1994) (Workman, J.)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 618) for discussion of topic.

**Right to**

***State ex rel. Brewer v. Starcher***, 465 S.E.2d 185 (1995) (Cleckley, J.)

See PLEA BARGAIN Acceptance of, Rules governing, (p. 506) for discussion of topic.

## PLEA BARGAIN

### Setting aside

***State v. D.E.G. Sr.***, 460 S.E.2d 657 (1995) (Per Curiam)

See INDICTMENT Joinder of offenses, (p. 355) for discussion of topic.

### Standard for acceptance of

***State v. Lewis***, 447 S.E.2d 570 (1994) (Workman, J.)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 618) for discussion of topic.

### Voluntariness

***State v. D.E.G. Sr.***, 460 S.E.2d 657 (1995) (Per Curiam)

See INDICTMENT Joinder of offenses, (p. 355) for discussion of topic.

### Wavier of rights

***State v. Harris***, 464 S.E.2d 363 (1995) (Cleckley, J.)

See JUVENILES Sentencing, Reconsideration upon reaching majority, (p. 450) for discussion of topic.

## POLICE OFFICER

### Incident reports

#### Confidentiality of

***Ogden Newspapers v. City of Williamstown***, 453 S.E.2d 631 (1994) (Neely, J.)

See JUVENILES Confidentiality of records, (p. 435) for discussion of topic.

#### Juveniles

***Ogden Newspapers v. City of Williamstown***, 453 S.E.2d 631 (1994) (Neely, J.)

See JUVENILES Confidentiality of records, (p. 435) for discussion of topic.

### Interrogation by

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 597) for discussion of topic.

### Intimidation of witnesses

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See RIGHT TO SPEEDY TRIAL Generally, (p. 574) for discussion of topic.

### Juvenile records

***Ogden Newspapers v. City of Williamstown***, 453 S.E.2d 631 (1994) (Neely, J.)

See JUVENILES Confidentiality of records, (p. 435) for discussion of topic.

**POLICE OFFICER**

**Misdemeanor arrest in presence of**

***State v. Forsythe***, 460 S.E.2d 742 (1995) (Per Curiam)

See ARREST Misdemeanor, In presence of police officer, (p. 46) for discussion of topic.

## POLYGRAPH TESTS

### Admissibility

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See EVIDENCE Polygraph tests, (p. 285) for discussion of topic.

***State v. Chambers***, 459 S.E.2d 112 (1995) (Neely, J.)

See EVIDENCE Polygraph tests, Reference to inadmissible, (p. 286) for discussion of topic.

### Refusal to take

#### Reference to at trial

***State v. Chambers***, 459 S.E.2d 112 (1995) (Neely, J.)

See EVIDENCE Polygraph tests, Reference to inadmissible, (p. 286) for discussion of topic.

**PRELIMINARY HEARING**

**Juveniles**

**Purpose of**

***In the Matter of Stephfon W.***, 442 S.E.2d 717 (1994) (Miller, J.)

See JUVENILES Preliminary hearing, Purpose of, (p. 441) for discussion of topic.

**Purpose of**

**Juveniles**

***In the Matter of Stephfon W.***, 442 S.E.2d 717 (1994) (Miller, J.)

See JUVENILES Preliminary hearing, Purpose of, (p. 441) for discussion of topic.

**Search warrant**

**Not to be at issue**

***State ex rel. Brown v. Dietrick***, 444 S.E.2d 47 (1994) (Miller, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 579) for discussion of topic.

## PRESUMPTIONS

### Elements of crime

***State v. Mayo***, 443 S.E.2d 236 (1994) (Miller, J.)

See HOMICIDE  Attempted murder, (p. 332) for discussion of topic.

## PRINCIPLE OF THE SECOND-DEGREE

### Sufficiency of evidence

***State v. Mayo***, 443 S.E.2d 236 (1994) (Miller, J.)

See AIDING AND ABETTING Witnessing crime, (p. 22) for discussion of topic.

## PRISON/JAIL CONDITIONS

### Cruel and unusual punishment

***Crain v. Bordenkircher***, 454 S.E.2d 108 (1994) (Workman, J.)

See PRISON/JAIL CONDITIONS Generally, (p. 521) for discussion of topic.

### Diet

***State ex rel. Carey v. Henning***, No. 22568 (12/14/94) (Per Curiam)

See JUDGES Duties, To rule in timely manner, (p. 413) for discussion of topic.

### Generally

***Crain v. Bordenkircher***, No. 16646 (10/27/95) (Per Curiam)

Pursuant to a final status conference on 3 October 1995, the Court deemed settled all issues related to the construction and operation of the new penitentiary at Mount Olive. The Court had monitored the project since 1981.

Transfer of prisoners began 14 February 1995 and the old facility closed 27 March 1995. The Court commended appellants' counsel and the Court Master; the latter was discharged with thanks. Case dismissed.

***Crain v. Bordenkircher***, 456 S.E.2d 206 (1995) (Per Curiam)

This fifteenth published opinion resulted from the Court's order in *Crain v. Bordenkircher*, 192 W.Va. 416, 452 S.E.2d 732 (1994), requiring a status report on March 7, 1995 concerning the new penitentiary.

Syl. pt. - "This Court has a duty to take such actions as are necessary to protect and guard the *Constitution* of the *United States* and the *Constitution* of the *State of West Virginia*." Syllabus Point 2, *Crain v. Bordenkircher*, 180 W.Va. 246, 376 S.E.2d 140 (1988).

**Generally** (continued)

***Crain v. Bordenkircher***, (continued)

Respondents advised that construction was complete and transfer began 14 February 1995. All remaining operational questions were resolved with the Special Master 20 December 1994.

Respondents predicted a closing date for the old penitentiary of 1 May 1995. The Court retained jurisdiction until that time, requiring certification when the last inmate is transferred and directing that all habeas corpus petitions relating to conditions of confinement and administrative policies be transferred to Fayette County. Parties to appear before the Court 3 October 1995 for a final hearing.

***Crain v. Bordenkircher***, 452 S.E.2d 733 (1994) (Per Curiam)

In this interim decision the Court reviewed the status report on progress of construction of the Mount Olive Correctional Complex. Respondents reported that inmates would begin moving into the facility in early January, 1995. The parties agreed to meet with Patrick McManus, special master, before the end of 1994 to review all areas of operation.

Syl. pt. " 'This Court has a duty to take such actions as are necessary to protect and guard the *Constitution* of the *United States* and the *Constitution* of the *State of West Virginia*.' Syllabus Point 2, *Crain v. Bordenkircher*, 180 W.Va. 246, 376 S.E.2d 140 (1988)." Syllabus, *Crain v. Bordenkircher*, 189 W.Va. 588, 433 S.E.2d 526 (1993).

The Court retained jurisdiction until closure of the old facility. Parties ordered to appear 7 March 1995.

***Crain v. Bordenkircher***, 452 S.E.2d 732 (1994) (Per Curiam)

See PRISON/JAIL CONDITIONS Generally, (p. 522) for discussion of topic.

**PRISON/JAIL CONDITIONS**

**Generally** (continued)

***Crain v. Bordenkircher***, (continued)

***Crain v. Bordenkircher***, 445 S.E.2d 730 (1994) (Per Curiam)

See PRISON/JAIL CONDITIONS Generally, (p. 520) for discussion of topic.

***Crain v. Bordenkircher***, 454 S.E.2d 108 (1994) (Workman, J.)

See PRISON/JAIL CONDITIONS Generally, (p. 521) for discussion of topic.

***Crain v. Bordenkircher***, 445 S.E.2d 730 (1994) (Per Curiam)

For the tenth time, the Court heard a status report regarding the new penitentiary originally required in this case. The matters at issue here involved training and operational matters, including: fire evacuation; use of force; drug and alcohol abuse testing; inmate property; inmate payroll; accounting procedures; medical and food services; disciplinary procedures; visitation; accessibility to the law library; moving protective custody to another facility; and monitoring of phone calls and mail.

Syl. pt. - " 'This Court has a duty to take such actions as are necessary to protect and guard the *Constitution* of the *United States* and the *Constitution* of the *State of West Virginia*.' Syllabus Point 2, *Crain v. Bordenkircher*, 180 W.Va. 246, 376 S.E.2d 140 (1988)". Syllabus Point 3, *Crain v. Bordenkircher*, 189 W.Va. 588, 433 S.E.2d 526 (1994).

The Court accepted the Special Master's recommendations as to all of these matters and set a status hearing 28 June 1994.

**Generally** (continued)

***Crain v. Bordenkircher***, 454 S.E.2d 108 (1994) (Workman, J.)

The circuit court granted early release to inmates at the West Virginia Penitentiary at Moundsville by crediting one day "commutation of sentence" for each day served after 1 July 1992, the original date for closure of the Moundsville facility. Appellees argued that the cuts were within the circuit court's power and were necessary to avoid cruel and unusual punishment under the *Eighth Amendment to the United States Constitution* and § 5 of the *West Virginia Constitution*. Appellees based their arguments on earlier decisions in this case, beginning in 1981, wherein Judge Recht issued a final order concluding that conditions at the Penitentiary constituted cruel and unusual punishment.

(Note: *Crain* has now been through thirteen published opinions; this opinion contains a history of previous decisions.)

Syl. pt. 1 - "This Court has a duty to take such actions as are necessary to protect and guard the *Constitution* of the *United States* and the *Constitution* of the *State of West Virginia*." Syllabus Point 2, *Crain v. Bordenkircher*, 180 W.Va. 246, 376 S.E.2d 140 (1988).

Syl. pt. 2 - Inherent in this Court's duty to take such actions as are necessary to protect and guard the *Constitution* of the *United States* and the *Constitution* of the *State of West Virginia* is the related duty to supervise all necessary actions through completion and the concomitant responsibility to revise and/or modify directives issued by lower courts pertaining to such actions.

The Court noted that *Harrah v. Leverette*, 165 W.Va. 665, 271 S.E.2d 322 (1980), on which the circuit court relied, rejected early release except in very unusual circumstances, and then only on a case by case determination by the Court (not, as here, as a remedy available to circuit courts). The Court restated that its original remedy for cruel and unusual punishment is still the preferred choice, namely, constructing a new facility. Reversed and remanded.

## PRISON/JAIL CONDITIONS

### Generally (continued)

***Crain v. Bordenkircher***, 452 S.E.2d 732 (1994) (Per Curiam)

Syl. pt. - " 'This Court has a duty to take such actions as are necessary to protect and guard the *Constitution* of the *United States* and the *Constitution* of the *State of West Virginia*.' Syllabus Point 2, *Crain v. Bordenkircher*, 180 W.Va. 246, 376 S.E.2d 140 (1988)." Syllabus, *Crain v. Bordenkircher*, 189 W.Va. 588, 433 S.E.2d 526 (1993).

The Court continued its long-established practice of monitoring construction and administration of the new state penitentiary at Mount Olive by reciting numerous administrative guidelines necessary for operation, some of which are still in process.

The projected completion date was moved from 1 July 1994 to 2 September 1994, with all inmates to be transferred by 31 October 1994. The Court noted construction delays and urged the Regional Jail Authority to take corrective action against the contractors; with reluctance, four more months wee allowed and yet another hearing set for 1 November 1994, at which time all matters relating to transfer of prisoners and administrative rules were to be discussed.

### Medical care

***State ex rel. Carey v. Henning***, No. 22568 (12/14/94) (Per Curiam)

See JUDGES Duties, To rule in timely manner, (p. 413) for discussion of topic.

***Wilson v. Hun***, 457 S.E.2d 662 (1995) (Per Curiam)

Petitioner filed pro se, alleging that he was not getting adequate medical care at the Huttonsville Correctional Center. The circuit court, following a habeas corpus hearing, found the care adequate. Petitioner was seen by several physicians for a cyst; the treatment had been incising and draining, while appellant wanted surgical removal. He claimed failure to remove constituted cruel and unusual punishment.

## PRISON/JAIL CONDITIONS

**Medical care** (continued)

***Wilson v. Hun***, (continued)

Syl. pt. 1 - " 'Certain conditions of. . . confinement may be so lacking in the area of adequate food, clothing, shelter, sanitation, medical care and personal safety as to constitute cruel and unusual punishment under the Eighth Amendment to the *United States Constitution* and Article III, Section 5 of the *West Virginia Constitution*.' Syllabus Point 2, *Hickson v. Kellison*, 170 W.Va. 732, 296 S.E.2d 855 (1982)." Syl. pt. 2, *Crain v. Bordenkircher*, 176 W.Va. 338, 342 S.E.2d 422 (1986).

Syl. pt. 2 - "The findings of fact of a trial court are entitled to peculiar weight upon appeal and will not be reversed unless they are plainly wrong." Syl. pt. 6, *Mahoney v. Walter*, 157 W.Va. 882, 205 S.E.2d 692 (1974).

The Court noted petitioner's medical file is "voluminous" and that he had been given considerable attention, continuing to date. Affirmed.

**Tobacco ban**

***State ex rel. Kincaid v. Parsons***, 447 S.E.2d 543 (1994) (Neely, J.)

*Helling v. McKinney*, 509 U.S. __, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993) held that an inmate states a cause of action for cruel and unusual punishment when he alleges prison officials have exposed him to tobacco smoke posing an unreasonable health risk. On 25 March 1994 the administrator of the South Central Regional Jail announced elimination of all tobacco use, including smokeless tobacco, by 1 June 1994. Inmates were advised by memorandum on 18 April 1994. Additional counseling was to be offered along with information and solicitation from support groups. Staff were still allowed areas in which they could smoke.

Syl. pt. 1 - An administrator of a Regional Jail cannot enforce a complete ban on either smoking or the use of smokeless tobacco without following the procedures set forth in our administrative procedures act, *W.Va. Code*, 29A-1-1 [1982] *et seq*.

## PRISON/JAIL CONDITIONS

**Tobacco ban** (continued)

***State ex rel. Kincaid v. Parsons***, (continued)

Syl. pt. 2 - In our society the use of tobacco is sufficiently customary that a total ban on the use of tobacco affects "private rights, privileges and interests" as contemplated by *W.Va. Code*, 29A-1-2 [1982]; however, in light of *Helling v. McKinney*, 509 U.S. __, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993), a regional jail administrator may limit smoking in such a reasonable way that smoke will not intrude upon non-smokers, and may limit the use of smokeless tobacco to those who dispose of smokeless tobacco in a sanitary manner.

The Court held the total ban of tobacco to be a "legislative rule" within the meaning of *W.Va. Code*, 29-1-2(d); therefore the Regional Jail Authority must promulgate a rule pursuant to the rule-making process, including opportunity for public comment and legislative review. While not a constitutional right, the right to smoke is a customary right subject to procedural safeguards. Writ awarded.

**Tobacco use regulated**

***State ex rel. Kincaid v. Parsons***, 447 S.E.2d 543 (1994) (Neely, J.)

See PRISON/JAIL CONDITIONS Tobacco ban, (p. 523) for discussion of topic.

## PRIVILEGE

### Attorney-client privilege

#### Before grand jury

***State ex rel. Doe v. Troisi***, 459 S.E.2d 139 (1995) (Cleckley, J.)

See SUBPOENAS Attorney-client privilege, When effective against, (p. 660) for discussion of topic.

#### Crime/fraud exception

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See ATTORNEY-CLIENT PRIVILEGE Crime/fraud exception, (p. 50) for discussion of topic.

#### Extent of

***State ex rel. Doe v. Troisi***, 459 S.E.2d 139 (1995) (Cleckley, J.)

See SUBPOENAS Attorney-client privilege, When effective against, (p. 660) for discussion of topic.

### Marital privilege

#### Defined

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Marital communications, (p. 239) for discussion of topic.

### Spousal immunity

***State v. Jarrell***, 442 S.E.2d 223 (1994) (Brotherton, J.)

See IMMUNITY Spousal testimony, (p. 349) for discussion of topic.

## PRIVITY

### Paternity actions

#### Support order allowed

***State ex rel. Cline v. Pentasuglia***, 457 S.E.2d 644 (1995) (Workman, J.)

See PATERNITY Determination of, Pursuant to RURESA, (p. 497) for discussion of topic.

## PROBABLE CAUSE

### Arrest

#### Confession following

***State v. Jones***, 456 S.E.2d 459 (1995) (Cleckley, J.)

See SELF-INCRIMINATION Statements by defendant, (p. 594) for discussion of topic.

#### Misdemeanor in presence of officer

***State v. Forsythe***, 460 S.E.2d 742 (1995) (Per Curiam)

See ARREST Misdemeanor, In presence of police officer, (p. 46) for discussion of topic.

### Determination by magistrate

***State ex rel. Brown v. Dietrick***, 444 S.E.2d 47 (1994) (Miller, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 579) for discussion of topic.

### Investigative stop

#### Not required for

***Hill v. Cline***, 457 S.E.2d 113 (1995) (Neely, J.)

See SEARCH AND SEIZURE Warrantless search, Probable cause for, (p. 588) for discussion of topic.

## PROBABLE CAUSE

### Juveniles

#### Determination at preliminary hearing

***In the Matter of Stephfon W.***, 442 S.E.2d 717 (1994) (Miller, J.)

See JUVENILES Preliminary hearing, Purpose of, (p. 441) for discussion of topic.

### Standard for

***Hill v. Cline***, 457 S.E.2d 113 (1995) (Neely, J.)

See SEARCH AND SEIZURE Warrantless search, Probable cause for, (p. 588) for discussion of topic.

### To stop and search

***Hill v. Cline***, 457 S.E.2d 113 (1995) (Neely, J.)

See SEARCH AND SEIZURE Warrantless search, Probable cause for, (p. 588) for discussion of topic.

### To stop vehicle

***State v. Stuart***, 452 S.E.2d 886 (1994) (Cleckley, J.)

See SEARCH AND SEIZURE Warrantless search, Probable cause to stop for, (p. 590) for discussion of topic.

### Warrantless arrest

***Hill v. Cline***, 457 S.E.2d 113 (1995) (Neely, J.)

See SEARCH AND SEIZURE Warrantless search, Probable cause for, (p. 588) for discussion of topic.

**PROBATION**

**Conditions of**

**Confinement**

***State v. Watters***, 447 S.E.2d 14 (1994) (Per Curiam)

See SENTENCING Probation, Condition of, (p. 632) for discussion of topic.

**Maximum time in home confinement**

***State v. Lewis***, 465 S.E.2d 384 (1995) (Recht, J.)

See PROBATION Home confinement, Time toward minimum sentence, (p. 529) for discussion of topic.

**Home confinement**

**Maximum time allowed**

***State v. Lewis***, 465 S.E.2d 384 (1995) (Recht, J.)

See PROBATION Home confinement, Time toward minimum sentence, (p. 529) for discussion of topic.

**Time toward minimum sentence**

***State v. Lewis***, 465 S.E.2d 384 (1995) (Recht, J.)

Appellant was convicted of third offense shoplifting and sentenced to a suspended term of one to ten, with five years probation with special conditions, including four months in the Southern Regional Jail followed by eight months of home confinement. Ms. Lewis was subject to alternative sentencing pursuant to *State v. Lewis*, 191 W.Va. 635, 447 S.E.2d 570 (1994).

**PROBATION**

**Home confinement** (continued)

**Time toward minimum sentence** (continued)

***State v. Lewis***, (continued)

She now complained that the sentence was in excess of the one-third minimum sentence, which is a condition for probation, because eight months of home confinement must be considered as detention in a secure facility; six months is the maximum period of confinement allowed under *W.Va. Code*, 62-12-9(b). The state contended that home confinement is more closely analogous to probation; and further, that probation includes only confinement in the county jail in calculation for the maximum period of confinement. Third offense shoplifting requires not less than one year be spent in the penitentiary but home confinement may be used as an alternative to the required prison time.

Syl. pt. 1 - " 'In ascertaining legislative intent, effect must be given to each part of the stature and to the statute as a whole so as to accomplish the general purpose of the legislation.' Syl. pt. 2, *Smith v. Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975). Syl. pt. 3, *State ex rel. Fetters v. Hott*, 173 W.Va. 502, 318 S.E.2d 446 (1984)." Syl. pt. 2, *State v. White*, 188 W.Va. 534, 425 S.E.2d 210 (1992).

Syl. pt. 2 - "In sentencing an offender, a court may either sentence the individual to a period of incarceration or place the individual on probation. If the court wishes to probate with a period of incarceration as a condition of that probation, West Virginia Code § 62-12-9(4) (1991) must be followed." Syllabus Point 3, *State v. White*, 188 W.Va. 534, 425 S.E.2d 210 (1992).

Syl. pt. 3 - Under the probation statute (*W.Va. Code* 62-12-9(b) (1994)), home incarceration is not considered the same as actual confinement in a county jail. Therefore, the time spent in home incarceration does not necessarily count toward the one-third time of the minimum sentence, which can be ordered under the probation statute as a condition for probation.

**PROBATION**

**Home confinement** (continued)

**Time toward minimum sentence** (continued)

***State v. Lewis***, (continued)

The Court noted three different statutes were at issue here, the shoplifting, home confinement and probation statutes. Although the provisions use different language the Court concluded that home confinement was not contemplated by the probation statute for purposes of calculating maximum time of confinement. As used here, home confinement is essentially probation and does not count toward one-third minimum incarceration as eligible time under the probation statute. *See W.Va. Code*, 62-11B-1, *et seq*. (home confinement may be given as alternative to confinement); *W.Va. Code*, 62-12-9(b) (probation; six month maximum home confinement); *W.Va. Code*, 61-3A-3(c) (shoplifting; minimum one year confinement). No error.

**Incarceration as condition of**

***State v. Watters***, 447 S.E.2d 14 (1994) (Per Curiam)

See SENTENCING Probation, Condition of, (p. 632) for discussion of topic.

**Juveniles**

**Eligibility for**

***State ex rel. Hill v. Zakaib***, 461 S.E.2d 194 (1995) (Fox, J.)

See JUVENILES Probation, Eligibility for, (p. 443) for discussion of topic.

**Length**

***State v. Watters***, 447 S.E.2d 14 (1994) (Per Curiam)

See SENTENCING Probation, Condition of, (p. 632) for discussion of topic.

## PROBATION

### Reference to prohibited at trial

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 544) for discussion of topic.

## PROHIBITION

### Appointment of counsel

#### Municipal offense

***State ex rel. Kees v. Sanders***, 453 S.E.2d 436 (1994) (McHugh, J.)

See APPOINTED COUNSEL Municipal offenses, (p. 44) for discussion of topic.

### Attorney-client privilege

***State ex rel. Doe v. Troisi***, 459 S.E.2d 139 (1995) (Cleckley, J.)

See SUBPOENAS Attorney-client privilege, When effective against, (p. 660) for discussion of topic.

### Blood test in paternity action

***State ex rel. David Allen B. v. Sommerville***, 459 S.E.2d 363 (1995) (Recht, J.)

See PATERNITY Blood tests, When required, (p. 495) for discussion of topic.

### Detainers

#### Failure to prosecute

***State ex rel. Modie v. Hill***, 443 S.E.2d 257 (1994) (McHugh, J.)

See INDICTMENT Dismissal of, Failure to prosecute, (p. 353) for discussion of topic.

## PROHIBITION

### Discovery

#### Sanction for inadequate

***State ex rel. Rusen v. Hill***, 454 S.E.2d 427 (1994) (Cleckley, J.)

See DISCOVERY Sanctions, Dismissal of indictment, (p. 179) for discussion of topic.

### Ethics proceedings

***State ex rel. Scales v. Committee on Legal Ethics***, 446 S.E.2d 729 (1994) (Per Curiam)

Petitioner sought writ of prohibition to prevent the Committee on Legal Ethics from prosecuting a complaint. The complaint arose out of a divorce proceeding in which petitioner represented the wife. Although the divorce complaint and answer did not raise the issue of domestic violence, the wife filed two domestic violence petitions in magistrate court before the divorce was pending; she also alleged continuing incidents of abuse.

The wife contacted her husband's commanding officer concerning the abuse; she was told that he could not take action unless her lawyer contacted him. Petitioner informed the family law master, who told her that the parties were prohibited from "disseminating information with regard to this divorce action," but noted that her ruling did not cover the pending matters in magistrate court.

Petitioner thereupon wrote to the husband's commanding officer, advising him of her representation and saying that "there may (sic) information that the military would have an interest in investigating." The husband filed an ethics complaint alleging that petitioner violated a court order with the intent of harassing and embarrassing him. He claimed that as a result of the letter he lost his security clearance and his White House position.

**PROHIBITION**

**Ethics proceedings** (continued)

***State ex rel. Scales v. Committee on Legal Ethics***, (continued)

Petitioner was charged with violations of burdening a third party in violation of Rule 4.4; with knowingly disobeying a pending order in violation of Rule 3.4; and for failing to advise her client that she must abide by the *Rules of Professional Conduct*, in violation of Rule 1.2(3). In her response, petitioner noted that her client has since gotten another lawyer because she "was not aggressive enough;" and that the husband had filed a five million dollar suit against her and the wife in U.S. District Court.

Syl. pt. - "In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal error plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance. Syllabus Point 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979).

The divorce proceeding clearly did not allege domestic violence. Finding petitioner did not violate a pending court order, nor deliberately intend to harass her client's husband (indeed petitioner's only purpose was to prevent further domestic violence), the Court granted the writ.

**Failure to prosecute**

**Detainers**

***State ex rel. Modie v. Hill***, 443 S.E.2d 257 (1994) (McHugh, J.)

See INDICTMENT Dismissal of, Failure to prosecute, (p. 353) for discussion of topic.

**PROHIBITION**

**Failure to prosecute** (continued)

**Three term rule**

***State ex rel. Waldron v. Stephens***, 457 S.E.2d 117 (1995) (Per Curiam)

See RIGHT TO SPEEDY TRIAL Standard for determining, (p. 575) for discussion of topic.

**Generally**

***State ex rel. Estes v. Egnor***, 443 S.E.2d 193 (1994) (Miller, J.)

See JUVENILES School attendance, Responsibility of parent or guardian, (p. 446) for discussion of topic.

**Juveniles**

**Release from evaluation**

***State ex rel. E.K. v. Merrifield***, No. 22013 (2/17/94) (Per Curiam)

See JUVENILES Psychological/psychiatric evaluation, Release from, (p. 445) for discussion of topic.

**Prosecuting attorney may use**

***State ex rel. Rusen v. Hill***, 454 S.E.2d 427 (1994) (Cleckley, J.)

See DISCOVERY Sanctions, Dismissal of indictment, (p. 179) for discussion of topic.

**PROHIBITION**

**Three term rule**

***State ex rel. Waldron v. Stephens***, 457 S.E.2d 117 (1995) (Per Curiam)

See RIGHT TO SPEEDY TRIAL  Standard for determining, (p. 575) for discussion of topic.

## PROMPT PRESENTMENT

### Delay in taking before magistrate

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See JUVENILE Self-incrimination, Waiver of right to counsel, (p. 447) for discussion of topic.

***State v. Jones***, 456 S.E.2d 459 (1995) (Cleckley, J.)

See SELF-INCRIMINATION Statements by defendant, (p. 594) for discussion of topic.

## PROPORTIONALITY

### Appropriateness of sentence

#### Generally

***State v. Farr***, 456 S.E.2d 199 (1995) (Per Curiam)

Appellant pled guilty to three counts of breaking and entering and was sentenced to three terms of one to ten years in the penitentiary, to be served consecutively to each other and to any existing sentences. Appellant and a co-defendant also admitted to various federal and state armed robberies in Georgia and Tennessee.

Appellant's guilty plea specified that he would be subject to one to ten on each charge and that the circuit court would have sole discretion. His Rule 35 reduction of sentence motion was denied.

Syl. pt. 1 - "While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to those sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence." Syl. pt. 4, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

Syl. pt. 2 - " 'Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.' Syl. pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982)." Syl. pt. 2, *State v. Farmer*, 193 W.Va. 84, 454 S.E.2d 378 (1994).

The Court noted the sentences were clearly within statutory limits. Finding imposition of sentence was not based on any impermissible factors, the Court affirmed.

***State v. Woods***, 460 S.E.2d 65 (1995) (Per Curiam)

Appellant was convicted of aggravated robbery of a convenience store and sentenced to thirty-six years. On appeal he claimed *W.Va. Const.* Art. III, § 5 was violated, along with *W.Va. Code*, 61-2-12 (person convicted of aggravated robbery "shall be confined in the penitentiary not less than ten years."

## PROPORTIONALITY

### **Appropriateness of sentence** (continued)

#### **Generally** (continued)

***State v. Woods***, (continued)

Syl. pt. 3 - "Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review." Syl. pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).

The Court cited *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983) for the two tests of proportionality: (1) whether the sentence "shocks the conscience of the court and society"; and (2) a balancing of the nature of the offense, the legislative purpose, a comparison with other jurisdictions, and a comparison with other offenses within West Virginia.

Here, the Court found the offense to have resulted in substantial permanent injury to the convenience store clerk. Appellant violently resisted arrest. Despite testimony from appellant's sister about appellant's alcohol abuse, physical injuries and lack of propensity for violence, the Court concluded the sentence was not disproportionate. No error.

#### **Juveniles**

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

Appellant, a juvenile, was transferred to adult status and convicted of aggravated robbery. He was sentenced to forty-five years. Appellant's counsel claimed in an affidavit that the sentence was retaliatory because the judge offered to sentence defendant to less than thirty years if a plea were entered.

Syl. pt. 7 - " 'Sentences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review.' Syl. pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982)." Syllabus Point 2, *State v. Farmer*, 193 W.Va. 84, 454 S.E.2d 378 (1994).

## PROPORTIONALITY

### Appropriateness of sentence (continued)

#### Juveniles (continued)

***State v. Sugg***, (continued)

Syl. pt. 8 - Rule 11 of the *West Virginia Rules of Criminal Procedure* requires that a judge explore a plea agreement once disclosed in open court; however, it does not license discussion of a hypothetical agreement that he may prefer.

The Court noted the forty-five year sentence could be considered reasonable. See *State v. Glover*, 177 W.Va. 650, 355 S.E.2d 631 (1987); *State v. England*, 180 W.Va. 342, 376 S.E.2d 548 (1988); and *State v. Spence*, 182 W.Va. 472, 388 S.E.2d 498 (1989); but cf. *State v. Cooper*, 172 W.Va. 266, 304 S.E.2d 851 (1983) (no weapon used and victim not seriously injured; only prior conviction was public intoxication).

Although a trial judge should never engage in plea bargaining, the Court declined to rule because of an insufficient record (habeas corpus was suggested).

#### Recidivism

***State v. Lewis***, 447 S.E.2d 570 (1994) (Workman, J.)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 618) for discussion of topic.

***State v. Wyne***, 460 S.E.2d 450 (1995) (Miller, J.)

See SENTENCING Enhancement, Proof of triggering offense, (p. 615) for discussion of topic.

## PROPORTIONALITY

### Third offense shoplifting

***State v. Lewis***, 447 S.E.2d 570 (1994) (Workman, J.)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 618) for discussion of topic.

**PROSECUTING**

**Attorney**

**Quasi-judicial role**

***State v. Hottinger***, 461 S.E.2d 462 (1995) (Per Curiam)

See PROSECUTING ATTORNEYS Duty, Generally, (p. 553) for discussion of topic.

## PROSECUTING ATTORNEYS

### Conduct at trial

#### Comments during opening or closing argument

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

Appellant was convicted of first-degree murder. At trial the prosecuting attorney argued the penalties of the different offenses charged, as well as cross-examined appellant's father on appellant's racial and gender prejudices. Specifically, he told the jury the punishment for each of the offenses, including the comment that appellant would be eligible for parole after ten years even if he were convicted of first-degree murder; and cross-examined appellant's father as to his son's affinity for Hitler and his prejudices against blacks and women. Appellant argued constitutional error in that the jury may have determined the offense based on its belief in appropriateness of the punishment; and prejudice for mentioning appellant's prejudices.

Syl. pt. 7 - Outside the context of cases involving a recommendation of mercy, it is improper for either party to refer to the sentencing possibilities of the trial court should certain verdicts be found or to refer to the ability of the trial court to place a defendant on probation.

Syl. pt. 8 - The jury's sole function in a criminal case is to pass on whether a defendant is guilty as charged based on the evidence presented at trial and the law as given by the jury instructions. The applicable punishments for the lesser-included offenses are not elements of the crime; therefore, the question of what punishment a defendant could receive if convicted is not a proper matter for closing argument. To the extent the decision in *State v. Myers*, 159 W.Va. 353, 222 S.E.2d 300 (1976), is inconsistent with our holding, it is expressly overruled.

Syl. pt. 9 - Appellate courts give strict scrutiny to cases involving the alleged wrongful injection of race, gender, or religion in criminal cases. Where these issues are wrongfully injected, reversal is usually the result. Where race, gender, or religion is a relevant factor in the case, its admission is not prohibited unless the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

**PROSECUTING ATTORNEYS**

**Conduct at trial** (continued)

**Comments during opening or closing argument** (continued)

***State v. Guthrie***, (continued)

Syl. pt. 10 - The curative admissibility rule allows a party to present otherwise inadmissible evidence on an evidentiary point where an opponent has "opened the door" by introducing similarly inadmissible evidence on the same point. Under this rule, in order to be entitled as a matter of right to present rebutting evidence on an evidentiary fact: (a) The original evidence must be inadmissible and prejudicial, (b) the rebuttal evidence must be similarly inadmissible, and (c) the rebuttal evidence must be limited to the same evidentiary fact as the original inadmissible evidence.

Syl. pt. 11 - An appellate court is obligated to see that the guarantee of a fair trial under Section 10 of Article III of the *West Virginia Constitution* is honored. Thus, only where there is a high probability that an error of due process proportion did not contribute to the criminal conviction will an appellate court affirm. High probability requires that an appellate court possess a sure conviction that the error did not prejudice the defendant.

Syl. pt. 12 - " 'Where the record of a criminal trial shows that the cumulative effect of numerous errors committed during the trial prevented the defendant from receiving a fair trial, his conviction should be set aside, even though any one of such errors standing alone would be harmless error.' Syl. pt. 5, *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972)." Syllabus Point 5, *State v. Walker*, 188 W.Va. 661, 425 S.E.2d 616 (1992).

The Court noted a prosecuting attorney cannot argue a recommendation of mercy will result in parole in ten years. *State v. Lindsey*, 160 W.Va. 284, 233 S.E.2d 734 (1977). Here, the prosecuting attorney said appellant would be eligible, not that he would receive parole. Further, a proper jury instruction was given. However, the Court noted neither side should mention sentencing to the jury. *State v. Parks*, 161 W.Va. 511, 243 S.E.2d 848 (1978). See also, *State v. Massey*, 178 W.Va. 427, 359 S.E.2d 865 (1987).

***State v. Guthrie***, (continued)

As to the cross-examination, the state argued appellant opened the door to cross-examination as to his prejudices when appellant was portrayed as quiet and Bible-reading. No collateral evidence was introduced showing appellant's prejudice, although discussion of statements made to the state's psychiatrist were mentioned at the bench. No curative instruction was given. The Court noted the prejudice was not relevant to the case under Rule 401 of the Rules of Evidence. Although the prosecution could have rebutted the allegation that appellant was peaceable under Rule 404(a)(1), Rule 404(a)(2) or Rule 405, it chose not to do so.

Rule 610 of the Rules of Evidence clearly states that evidence of beliefs or opinions on matters of religion are not admissible to show a witness' credibility. Despite the fact appellant's own evidence was inadmissible, because appellant's prejudice was not a relevant character trait and was not admissible under the curative admissibility rule or Rule 403 of the Rules of Evidence (prejudice outweighed probative effect), the cross-examination was error.

The prosecution should have shown that the appellant's evidence was prejudicial and inadmissible, and that his own cross-examination was limited to the evidence originally offered. Here, appellant's alleged Bible reading and peacefulness was not related to his like of Adolph Hitler, or his prejudice against blacks and women.

Especially in a case like this, where the killing was not at issue but rather the degree of the crime, the Court had "grave doubt" as to the effect of these errors. Because the prosecution was allowed to suggest that any conviction of less than first-degree murder would result in appellant's release in five years and the appellant was a racist, sexist and Nazi, the cumulative error was substantial. Further, the prosecution asked appellant if he said, upon learning of the victim's death, "that's too bad, buddy. Do you think it'll snow." The prosecution admitted having no factual basis for alleging appellant made the statement; although appellant denied making the statement, the prejudice was great. The statement was not given to the defense during discovery. Reversed and remanded.

**PROSECUTING ATTORNEYS**

**Conduct at trial** (continued)

**Comments during opening or closing argument** (continued)

***State v. Hottinger***, 461 S.E.2d 462 (1995) (Per Curiam)

See PROSECUTING ATTORNEYS Duty, Generally, (p. 553) for discussion of topic.

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

Appellant was convicted of first-degree murder. During closing argument, the prosecution claimed appellant had "used Richard Collins, Randy Highland, and she has used Jane Morgan (sic)" (appellant's co-conspirators and appellant's attorney, respectively). Appellant's attorney objected and the court instructed the jury that the remark was not to be considered.

In addition, the prosecution argued that appellant was not scared of her co-conspirator as she claimed, especially in light of her giving him her car and looking for him with her mother accompanying her. Further, the prosecution argued that appellant consistently lied about her actions and motivations.

Finally, appellant claimed the prosecution attempted to mislead the jury on the elements of felony-murder.

Syl. pt. 5 - "A judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice." Syllabus point 5, *State v. Ocheltree*, 170 W.Va. 68, 289 S.E.2d 742 (1982).

The Court found no "manifest injustice" given the nature of the first remark and the curative instruction; that the other conclusions were drawn from appellant's testimony; and that the trial court's instructions on felony murder and the context of the arguments did not mislead the jury on the elements of the crime. The Court did note the prosecution should not have claimed appellant lied on the witness stand. No error.

**PROSECUTING ATTORNEYS**

**Conduct at trial** (continued)

**Comments during opening or closing argument** (continued)

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

Appellant was convicted of second-degree sexual assault. He claimed both the prosecuting attorney and the judge made improper comments at trial. During opening argument the prosecuting attorney referred to only two people knowing what had happened, the victim, who was going to testify, and (defense counsel objected before defendant was mentioned). However, following an unsuccessful attempt at a mistrial, defense counsel referred to the defendant's testimony.

The judge's comment was to the effect that proffered defense testimony had already been presented. The comment was made while overruling the prosecution's objection to appellant's testimony concerning the victim's testimony as to the dates of the assault.

Syl. pt. 3 - " 'A judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney in his opening statement to a jury which do not clearly prejudice the accused or result in manifest injustice.' Syl. pt. 1, *State v. Dunn*, 162 W.Va. 63, 246 S.E.2d 245 (1978)."

The Court noted that comment on defendant's failure to testify was improper. *State v. Clark*, 170 W.Va. 224, 292 S.E.2d 643 (1982). The record here, however, showed that appellant intended to testify prior to the prosecution's remarks. The circuit court even offered to give curative instructions. See *State v. Leadingham*, 190 W.Va. 482, 438 S.E.2d 825 (1993).

Although a judge may give his opinion, *State v. McGee*, 160 W.Va. 1, 239 S.E.2d 832 (1976), a trial judge has considerable discretion in the conduct of a trial. *State v. Massey*, 178 W.Va. 427, 359 S.E.2d 865 (1987). This comment simply asked how defendant's questioning was relevant. No error.

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

Appellant was convicted of first-degree murder. During closing argument the prosecution said that appellant's trial counsel's remarks were "nothing but a low down lie." Appellant's counsel had evidently claimed that the prosecution withheld information. No objection was made to the prosecution's statement.

Further, appellant claimed that the prosecution added evidence during closing argument concerning glass recovered from the victim's pants. Finally, appellant claimed the prosecution misquoted DNA evidence; objection was made and the prosecution apologized.

Syl. pt. 10 - " 'Where objections were not shown to have been made in the trial court, and the matters concerned were not jurisdictional in character, such objections will not be considered on appeal.' Syllabus Point 1, *State Road Commission v. Ferguson*, 148 W.Va. 742, 137 S.E.2d 206 (1964)." Syllabus point 3, *O'Neal v. Peake Operating Co.*, 185 W.Va. 28, 404 S.E.2d 420 (1991).

The Court found the first remark to have been waived; the second was supported by the evidence and the third was cured by the prosecution's apology. No error.

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

Appellant was convicted of aggravated robbery. Wrapped coins found on appellant's person were introduced at trial. During closing argument the prosecution referred to appellant's having the "rolls of coins that came out of the cash register."

Syl. pt. 5 - A judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice.

**Conduct at trial** (continued)

**Comments during opening or closing argument** (continued)

***State v. Sugg***, (continued)

Syl. pt. 6 - Four factors are taken into account in determining whether improper prosecutorial comment is so damaging as to require reversal: (1) the degree to which the prosecutor's remarks have a tendency to mislead the jury and to prejudice the accused; (2) whether the remarks were isolated or extensive; (3) absent the remarks, the strength of competent proof introduced to establish the guilt of the accused; and (4) whether the comments were deliberately placed before the jury to divert attention to extraneous matters.

The Court noted plausible inferences may be drawn from evidence introduced. *State v. Asbury*, 187 W.Va. 87, 92, 415 S.E.2d 891, 896 (1992). No error; even if not supported by the evidence, the remarks must actually prejudice appellant's case. No prejudice was found here.

**Comments on defendant's veracity**

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 547) for discussion of topic.

**Cross-examination**

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

Appellant was convicted of first-degree murder. On appeal she claimed the prosecution improperly asked questions about giving up a child for adoption and about her use of drugs. During direct examination defense counsel had asked whether she had any children and whether her mother had adopted the child. Appellant claimed she let her mother adopt the child because her mother could better care for the child. Appellant denied having used drugs. No objection was made to these questions.

**PROSECUTING ATTORNEYS**

**Conduct at trial** (continued)

**Cross-examination** (continued)

***State v. Justice***, (continued)

Syl. 4 - "Failure to make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court." Syllabus point 7, *State v. Cirullo*, 142 W.Va. 56, 93 S.E.2d 526 (1956).

The Court found no prejudice and that the failure to object waived any right to challenge the questions on appeal.

**Scope of**

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

See PROSECUTING ATTORNEYS Conduct at trial, Cross-examination, (p. 550) for discussion of topic.

**Detainers**

**Failure to prosecute**

***State ex rel. Modie v. Hill***, 443 S.E.2d 257 (1994) (McHugh, J.)

See INDICTMENT Dismissal of, Failure to prosecute, (p. 353) for discussion of topic.

## PROSECUTING ATTORNEYS

### Disqualification

#### Prior relationship with accused

***State ex rel. Tyler v. MacQueen***, 447 S.E.2d 289 (1994) (Workman, J.)

Petitioner was indicted on charges of breaking and entering, entering without breaking, attempted aggravated robbery, attempted murder, aggravated robbery, malicious wounding and grand larceny. He filed a petition for disqualification of the entire prosecuting attorney's office, with request for a special prosecutor, which petition was denied.

As grounds, he alleged that he was represented by an appointed attorney on these charges prior to indictment. He met with that counsel several times and claimed to have confided various facts to him; a private investigator was hired and a significant amount of material compiled subject to the work-product rule. Counsel was hired by the prosecuting attorney's office before trial.

Syl. pt. 1 - "A prosecuting attorney should recuse himself from a criminal case if, by reason of his professional relations with the accused, he has acquired any knowledge of facts upon which the prosecution is predicated or closely related, though the consultations had with the accused were gratuitous and done in good faith." Syl. Pt. 5, *State v. Britton*, 157 W.Va. 711, 203 S.E.2d 462 (1974).

Syl. pt. 2 - Pursuant to Rule 1.11 of the *West Virginia Rules of Professional Conduct*, the fact that an assistant prosecuting attorney previously represented a criminal defendant while in private practice does not preclude the prosecutor's office as a whole from participation in further prosecution of criminal charges against the defendant, provided that the circuit court has held a hearing on any motion to disqualify filed on this basis and determined that the assistant prosecutor has effectively and completely been screened from involvement, active for indirect, in the case.

*Chapman v. Summerfield*, No. 17911 (1987) (unpublished order) would have required disqualification but Rule 1.11 superseded *Chapman*. Commentary to Rule 1.11 makes clear that "Paragraph (c) does not disqualify other lawyers in the agency with which the lawyer in question has become associated." See also, *W.Va. State Bar Comm. on Legal Ethics*, Op. 92-01, in accord.

## PROSECUTING ATTORNEYS

### Disqualification (continued)

#### Prior relationship with accused (continued)

***State ex rel. Tyler v. MacQueen***, (continued)

The Court found sufficient representations by the prosecuting attorney and his assistant that steps were taken to insure the assistant's prior knowledge of the case was not known to other attorneys in the office; the assistant took no part in prosecuting the case. *Chapman*, *supra*, is overruled. No error.

### Duty

#### Generally

***State v. Hottinger***, 461 S.E.2d 462 (1995) (Per Curiam)

Appellant was convicted of sexual assault in the second and third degrees. During his opening statement the prosecuting attorney stated that the victim's mother's boyfriend was essentially pimping the victim, advertising the fact that she was only fifteen years old. Appellant claimed in his motion for new trial that the statement impermissibly referred to other defendants and to facts not in evidence.

After describing the charges, the prosecutor also said "that's the two offenses that this man is guilty of." Appellant claims the prosecutor improperly gave his opinion as to appellant's guilt.

Syl. pt. 1 - " 'The prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case. In keeping with his position, he is required to avoid the role of a partisan, eager to convict, and must deal fairly with the accused as well as the other participants in the trial. It is the prosecutor's duty to set a tone of fairness and impartiality, and while he may and should vigorously pursue the State's case, in so ding he must not abandon the quasi-judicial role with which he is cloaked under the law.' Syl. pt. 3, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977)." Syl. pt. 1, *State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 288 (1981).

**PROSECUTING ATTORNEYS**

**Duty** (continued)

**Generally** (continued)

***State v. Hottinger***, (continued)

Syl. pt. 2 - " 'An attorney for the state may prosecute vigorously as long as he deals fairly with the accused; but he should not become a partisan, intent only on conviction. And, it is a flagrant abuse of his position to refer, in his argument to the jury, to material facts outside the record, or not fairly deducible therefrom.' Syllabus, *State v. Moose*, 110 W.Va. 476, 158 S.E. 715 (1931)." Syl. pt. 2, *State v. Critzer*, 167 W.Va. 655, 280 S.E.2d 188 (1981).

Syl. pt. 3 - "A judgment of conviction will not be reversed because of improper remarks made by a prosecuting attorney in his opening statement to a jury which do not clearly prejudice the accused or result in manifest injustice." Syl. pt. 1, *State v. Dunn*, 162 W.Va. 63, 246 S.E.2d 245 (1978).

The Court noted the first remark did mention facts which were not subsequently introduced (the victim claimed the boyfriend did not make the statements alleged); however, appellant did not show actual prejudice. The Court viewed discussion during opening statements of evidence not subsequently introduced as less damaging than arguing during closing from facts not introduced. No error.

The prosecuting attorney followed the second statement with a clear charge to the jury that it was their duty to determine guilt. No error.

The Court summarily disposed of other remarks complained of, noting that trial counsel failed to object and that the trial court instructed the jury to disregard the remarks. No error.

## PROSECUTING ATTORNEYS

### Failure to disclose

#### Exculpatory evidence

***State v. Franklin***, 448 S.E.2d 158 (1994) (Per Curiam)

See EVIDENCE Exculpatory, Failure to disclose, (p. 270) for discussion of topic.

#### Sanction for

***State ex rel. Rusen v. Hill***, 454 S.E.2d 427 (1994) (Cleckley, J.)

See DISCOVERY Sanctions, Dismissal of indictment, (p. 179) for discussion of topic.

### Failure to prepare final order

***Committee on Legal Ethics v. Simmons***, No. 22131 (5/20/93) (Per Curiam)

See ATTORNEYS Discipline, Failure to follow reinstatement plan, (p. 74) for discussion of topic.

### Failure to prosecute

#### Detainers

***State ex rel. Modie v. Hill***, 443 S.E.2d 257 (1994) (McHugh, J.)

See INDICTMENT Dismissal of, Failure to prosecute, (p. 353) for discussion of topic.

## PROSECUTING ATTORNEYS

### Forfeiture

#### Probable cause required

***Lawrence Frail v. $24,900, Palmero and Rivera***, 453 S.E.2d 307 (1994) (Miller, J.)

See FORFEITURE Probable cause required, (p. 308) for discussion of topic.

### Prohibition

#### When appropriate

***State ex rel. Rusen v. Hill***, 454 S.E.2d 427 (1994) (Cleckley, J.)

See DISCOVERY Sanctions, Dismissal of indictment, (p. 179) for discussion of topic.

### Recusal

#### Prior representation of accused

***State ex rel. Tyler v. MacQueen***, 447 S.E.2d 289 (1994) (Workman, J.)

See PROSECUTING ATTORNEYS Disqualification, Prior relationship with accused, (p. 552) for discussion of topic.

### Special prosecutor

#### Authorization for

***State v. Crouch***, 445 S.E.2d 213 (1994) (Neely, J.)

Appellant was tried by a special prosecutor during his motion for new trial subsequent to newly-discovered evidence.

**PROSECUTING ATTORNEYS**

**Special prosecutor** (continued)

**Authorization for** (continued)

***State v. Crouch***, (continued)

Syl. pt. 2 - Under *W.Va. Code*, 7-7-8 [1993], the employment of a practicing lawyer to assist the State in a criminal prosecution, although not affirmatively authorized, is not prohibited. The specific provision of *W.Va. Code*, 7-7-8 [1993] relating to private prosecutors reads:

> No provision of this section shall be construed to prohibit the employment by any person of a practicing attorney to assist in the prosecution of any person or corporation charged with a crime.

The Court found the private prosecutor's participation proper in that he had been present from the inception; further, he was better acquainted with the case. No error.

**Witness unavailable**

**Proof of**

***State v. Shepherd***, 442 S.E.2d 440 (1994) (Per Curiam)

See BURDEN OF PROOF Witness unavailable, (p. 133) for discussion of topic.

## PSYCHOLOGICAL/PSYCHIATRIC EVALUATIONS

### Admissibility of victim's records

#### Examinations

***State v. Roy***, 460 S.E.2d 277 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Psychological/psychiatric, (p. 245) for discussion of topic.

### Child sexual abuse

#### Opinion on

***State v. Wood***, 460 S.E.2d 771 (1995) (McHugh, C.J.)

See EVIDENCE Admissibility, Expert opinion, (p. 224) for discussion of topic.

### Denial of

***State v. Malick***, 457 S.E.2d 482 (1995) (Per Curiam)

Appellant was convicted of sexual assault. He claimed he was wrongfully denied the opportunity to have a psychological evaluation of the victim. The trial judge believed the victim to be credible in her testimony and allowed opportunity for cross-examination.

Appellant claimed the victim lacked mental capacity to distinguish between the assault here and one occurring the same month involving another defendant; and that she lacked the ability to distinguish between truth and falsehood and did not understand the importance of telling the truth.

The Court noted these assertions were not supported and that the record showed accurate responses to factual questions. Trial judges are accorded great discretion to determine an infant's competence. *State v. Daggert*, 167 W.Va. 411, 280 S.E.2d 545 (1981). No error.

## PSYCHOLOGICAL/PSYCHIATRIC EVALUATIONS

### Juveniles

***State ex rel. E.K. v. Merrifield***, No. 22013 (2/17/94) (Per Curiam)

See JUVENILES Psychological/psychiatric evaluation, Release from, (p. 445) for discussion of topic.

## PSYCHOLOGICAL/PSYCHIATRIC EVALUATIONS

### Self-incrimination

#### Waiver during examination

***State v. Bush***, 442 S.E.2d 437 (1994) (Per Curiam)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Psychological/psychiatric examination, Waiver during, (p. 606) for discussion of topic.

## RECIDIVISM

### Sentencing

***State v. Hopkins***, 453 S.E.2d 317 (1994) (Neely, J.)

See SENTENCING Enhancement, Prior offense without counsel, (p. 613) for discussion of topic.

***State v. Lewis***, 447 S.E.2d 570 (1994) (Workman, J.)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 618) for discussion of topic.

### Proof of triggering offense

***State v. Wyne***, 460 S.E.2d 450 (1995) (Miller, J.)

See SENTENCING Enhancement, Proof of triggering offense, (p. 615) for discussion of topic.

## REENACTMENT OF CRIME

### On cross-examination

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Reenactment of crime, (p. 247) for discussion of topic.

*RES JUDICATA*

**Paternity actions**

***State ex rel. Cline v. Pentasuglia***, 457 S.E.2d 644 (1995) (Workman, J.)

See PATERNITY Determination of, Pursuant to RURESA, (p. 497) for discussion of topic.

## RIGHT TO BE PRESENT

### All stages of proceedings

***State v. Allen***, 455 S.E.2d 541 (1994) (Cleckley, J.)

Appellant was convicted of third offense DUI. After beginning its deliberations, the jury sent a message to the judge that it needed information on whether the vehicle in question had two or four doors. The judge responded that "we cannot respond to this at this time. You simply must decide the case on the evidence as you remember it." The jury deliberated a total of two hours.

When the jury was brought back to be sent home for the day, both communications were discussed in appellant's presence. One juror inquired how long deliberations should continue before a jury would be considered deadlocked; the court responded that "we are not going to retry this case." Appellant's counsel then told the jury the court was not suggesting any juror should change his or her vote to reach a verdict. The judge agreed.

The next day, after two more hours' deliberation, the jury advised the judge it was unable to reach a unanimous decision. The court replied "you will be permitted to go to lunch and return to continue deliberations. You may decide on one or more of the individual counts verdicts." Appellant's counsel was not advised.

After further deliberation, the jury advised it was deadlocked on two counts but had reached a verdict on one; again without consulting with appellant's counsel, the judge advised "keep working for a while and I'll discuss the matter with you." Within minutes the jury announced a unanimous decision.

Appellant's counsel claimed denial of right to counsel and of the right to be present during every stage of a criminal proceeding. See *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

Syl. pt. 1 - "As a general rule, all communications between the trial judge and the jury, after the submission of the case, must take place in open court and in the presence of, or after notice to, the parties or their counsel." Syllabus Point 1, *Klesser v. Stone*, 157 W.Va. 332, 201 S.E.2d 269 (1973).

**All stages of proceedings** (continued)

***State v. Allen***, (continued)

Syl. pt. 2 - "The defendant has a right under Article III, Section 14 of the *West Virginia Constitution* to be present at all critical stages in the criminal proceeding; and when he is not, the State is required to prove beyond a reasonable doubt that what transpired in his absence was harmless." Syllabus Point 6, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

Syl. pt. 3 - The proper method of responding to a written jury inquiry during the deliberations period in a criminal case, as we stated in *State v. Smith*, 156 W.Va. 385, 193 S.E.2d 550 (1972), is for the judge to reconvene the jury and to give further instructions, if necessary, in the presence of the defendant and counsel in the courtroom.

Here, the jury's indecision could have been cured without any *ex parte* communication: the jury could have been brought back before both counsel and advised; the case could have been reopened and further evidence taken (see *State v. Sandler*, 175 W.Va. 572, 336 S.E.2d 535 (1985); or stipulations made. The circuit court exacerbated the error by comments in the jury's presence that the case would not be retried. Error here rose to constitutional level and was clearly not harmless beyond a reasonable doubt. (See *State v. Kelley*, 192 W.Va. 124, 451 S.E.2d 425 (1994); see also *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824 (1967). Reversed.

## RIGHT TO CONFRONT

### Admissibility of extrajudicial statements

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

See SIXTH AMENDMENT Right to counsel, Admissibility of extrajudicial statements, (p. 649) for discussion of topic.

***State v. Dillon***, 447 S.E.2d 583 (1994) (Workman, J.)

See EVIDENCE Admissibility, Tape recorded statements to informant, (p. 255, 256, 257, 258, 259) for discussion of topic.

***State v. Mason***, 460 S.E.2d 36 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Extrajudicial statements, (p. 226) for discussion of topic.

***State v. Osakalumi***, 461 S.E.2d 504 (McHugh, C.J.)

See EVIDENCE Admissibility, Extrajudicial statements, (p. 230) for discussion of topic.

***State v. Phillips***, 461 S.E.2d 75 (1995) (Cleckley, J.)

Appellant was convicted of the murder of his wife. There were no witnesses. At trial appellant claimed his gun jammed while hunting and he was attempting to remove shells while talking with his mother on the telephone. During the conversation the gun discharged, fatally wounding his wife. Appellant claimed he told his mother to call 911, hung up and called 911 himself and also told a neighbor to call 911.

**Admissibility of extrajudicial statements** (continued)

***State v. Phillips***, (continued)

At trial, various witnesses testified that appellant was having a longstanding affair at the time of the shooting; that the decedent told them appellant had numerous affairs; and that she planned to divorce appellant upon discovery of evidence of his affairs. Most of the testimony was admitted under Rule 803(1) of the Rules of Evidence (present sense impression) and Rule 803(3) (then-existing mental, emotional or physical condition).

Syl. pt. 1 - " 'Generally, out-of-court statements made by someone other than the declarant while testifying are not admissible unless: 1) the statement is not being offered for the truth of the matter asserted, but for some other purpose such as motive, intent, state-of-mind, identification or reasonableness of the party's action; 2) the statement is not hearsay under the rules; or 3) the statement is hearsay but falls within an exception provided for in the rules.' Syl. Pt. 1 *State v. Maynard*, 183 W.Va. 1, 393 S.E.2d 221 (1990)." Syllabus Point 2, *State v. Dillon*, 191 W.Va. 648, 447 S.E.2d 583 (1994).

Syl. pt. 2 - "The mission of the Confrontation Clause found in the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution* is to advance a practical concern for the accuracy of the truth-determining process in criminal trials, and the touchstone is whether there has been a satisfactory basis for evaluating a truth of the prior statement. An essential purpose of the Confrontation Clause is to ensure an opportunity for cross-examination. In exercising this right, an accused may cross-examine a witness to reveal possible biases, prejudices, or motives." Syllabus Point 1, *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995).

Syl. pt. 3 - "For purposes of the Confrontation Clause found in the Sixth Amendment to the *United States Constitution* and Section 14 of Article III of the *West Virginia Constitution*, no independent inquiry into reliability is required when the evidence falls within a firmly rooted hearsay exception." Syllabus Point 6, *State v. Mason*, 194 W.Va. 221, 460 S.E.2d 36 (1995).

## RIGHT TO CONFRONT

**Admissibility of extrajudicial statements** (continued)

***State v. Phillips***, (continued)

Syl. pt. 4 - It is within a trial court's discretion to admit an out-of-court statement under Rule 803(1), the present sense impression exception, of the *West Virginia Rules of Evidence* if: (1) The statement was made at the time or shortly after an event; (2) the statement describes the event; and (3) the event giving rise to the statement was within a declarant's personal knowledge.

Syl. pt. 5 - Although a trial court may consider corroborating evidence in determining whether a statement meets the prerequisites of Rule 803(1) of the *West Virginia Rules of Evidence*, a separate showing of trustworthiness is not required for a statement to qualify under this hearsay exception.

Syl. pt. 6 - An extrajudicial statement offered for admission under the state-of-mind exception of Rule 803(3) of the *West Virginia Rules of Evidence* must also be tested under the relevancy requirements of Rule 401 and Rule 402 of the *Rules of Evidence*. If the declarant's state of mind is irrelevant to the resolution of the case, the statement must be excluded.

The Court found the statements were improperly admitted. None of the statements were admissible under present sense impression (803(1) because they were not made contemporaneously with the event described. The victim's comments related by the witnesses here were narrative statements drawn from past impressions or information.

As to Rule 803(3) (then-existing mental state), the Court found the victim's state of mind to be disconnected from the conduct at issue. The question of whether defendant's shooting was accidental was not related to the victim's state of mind, even with respect to wanting a divorce.

The Court found that a conviction was not possible after excluding the erroneously admitted testimony. Reversed and remanded.

## RIGHT TO CONFRONT

### Right to be present at all stages

***State v. Allen***, 455 S.E.2d 541 (1994) (Cleckley, J.)

See RIGHT TO BE PRESENT All stages of proceedings, (p. 564) for discussion of topic.

### Spousal testimony to grand jury

***State v. Jarrell***, 442 S.E.2d 223 (1994) (Brotherton, J.)

Appellant was convicted of first-degree murder. Both appellant and his sister were convicted for the murder of her husband. At trial the grand jury transcript of the testimony of another of appellant's sisters was read.

Upon being called to testify, appellant sought to have her declared incompetent. The prosecution noted that the sister originally claimed she could not testify to the grand jury on account of insanity and that "a couple of hours in jail cured her...." Following an *in camera* hearing, the trial court initially ruled she was competent but immediately reversed himself when the witness became uncooperative.

Appellant claimed the reading of the grand jury transcript violated appellant's right to confront his accusers.

Syl. pt. 2 - "The Confrontation Clause contained in the Sixth Amendment to the *United States Constitution* provides: 'In all criminal prosecutions, the accused shall . . . be confronted with the witnesses against him.' This clause was made applicable to the states through the Fourteenth Amendment to the *United States Constitution*." Syllabus point 1, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

Syl. pt. 3 - "The Sixth Amendment to the *United States Constitution* guarantees an accused the right to confront the witnesses against him. The Sixth Amendment right of confrontation includes the right of cross-examination." Syllabus point 1, *State v. Mullens*, 179 W.Va. 567, 371 S.E.2d 64 (1988).

## RIGHT TO CONFRONT

**Spousal testimony to grand jury** (continued)

***State v. Jarrell***, (continued)

Syl. pt. 4 - " ' "The question of the competency of a witness to testify is left largely to the discretion of the trial court and its judgment will not be disturbed unless shown to have been plainly abused resulting in manifest error." Point 8, Syllabus *State v. Wilson*, 157 W.Va. 1036, 207 S.E.2d 174 (1974).' Syl. Pt. 3, *State v. Butcher*, 165 W.Va. 522, 270 S.E.2d 156 (1980)." Syllabus point 2, *State v. Merritt*, 183 W.Va. 601, 396 S.E.2d 871 (1990).

The Court noted the prosecution asked that the witness be declared unavailable but claimed defense counsel should have cross-examined the witness after the reading of the transcript. The Court agreed with appellant that the witness cannot be competent to testify for purposes of cross-examination but incompetent so as to allow reading of the transcript in lieu of testimony. The witness was not declared incompetent and was available.

Abuse of discretion in allowing the transcript into evidence. Reserved and remanded.

**RIGHT TO COUNSEL**

**Abuse and neglect**

***In the Matter of Lindsey C.***, 473 S.E.2d 110 (1995) (Albright, J.)

See TERMINATION OF PARENTAL RIGHTS Guardian required, (p. 678) for discussion of topic.

**Critical stages**

**Effective assistance of counsel during**

***State ex rel. Bess v. Legursky***, 465 S.E.2d 892 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 371) for discussion of topic.

***State ex rel. Daniel v. Legursky***, 465 S.E.2d 416 (1995) (Cleckley, J.)

See INEFFECTIVE ASSISTANCE Adequacy of investigation, (p. 362) for discussion of topic.

**Denial of**

**Presence during judge's communication with jury**

***State v. Allen***, 455 S.E.2d 541 (1994) (Cleckley, J.)

See RIGHT TO BE PRESENT All stages of proceedings, (p. 564) for discussion of topic.

**Enhancement of sentence**

***State v. Day***, 447 S.E.2d 576 (1994) (Per Curiam)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 617) for discussion of topic.

## RIGHT TO COUNSEL

**Enhancement of sentence** (continued)

***State v. Lewis***, 447 S.E.2d 570 (1994) (Workman, J.)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 618) for discussion of topic.

**Municipal offenses**

***State ex rel. Kees v. Sanders***, 453 S.E.2d 436 (1994) (McHugh, J.)

See APPOINTED COUNSEL Municipal offenses, (p. 44) for discussion of topic.

**Sentencing**

**Enhancement by prior uncounseled convictions**

***State v. Hopkins***, 453 S.E.2d 317 (1994) (Neely, J.)

See SENTENCING Enhancement, Prior offense without counsel, (p. 613) for discussion of topic.

**Shoplifting**

***State v. Day***, 447 S.E.2d 576 (1994) (Per Curiam)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 617) for discussion of topic.

**Termination of parental rights**

***In the Matter of Lindsey C.***, 473 S.E.2d 110 (1995) (Albright, J.)

See TERMINATION OF PARENTAL RIGHTS Guardian required, (p. 678) for discussion of topic.

## RIGHT TO COUNSEL

### Waiver must be knowing

***City of Bluefield v. Williams***, 456 S.E.2d 548 (1995) (Per Curiam)

Appellant was convicted of DUI, first offense, under the City of Bluefield ordinances. He claimed the circuit court failed to determine whether he made a knowing and intelligent waiver of counsel and did not hold a hearing to determine whether evidence of his refusal to take a breathalyzer should be admitted.

Syl. pt. - " 'The determination of whether an accused has knowingly and intelligently elected to proceed without the assistance of counsel depends on the facts and circumstances of the case. The test in such cases is not the wisdom of the accused's decision to represent himself or its effect upon the expeditious administration of justice, but, rather, whether the defendant is aware of the dangers of self-representation and clearly intends to waive the rights he relinquishes by electing to proceed *pro se*.' *State v. Sheppard*, 172 W.Va. 656, 310 S.E.2d 173, 188 (1983) (citations omitted)." Syl. pt. 2, *State v. Sandler*, 175 W.Va. 572, 336 S.E.2d 535 (1985).

Appellant's election to proceed pro se was not in the record, nor any evidence to show he was aware of the danger and clearly intended to waive his right to counsel. Reversed and remanded.

### Waiver of

***City of Bluefield v. Williams***, 456 S.E.2d 548 (1995) (Per Curiam)

See RIGHT TO COUNSEL Waiver must be knowing, (p. 573) for discussion of topic.

### By juvenile

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See JUVENILE Self-incrimination, Waiver of right to counsel, (p. 447) for discussion of topic.

## RIGHT TO SPEEDY TRIAL

### Generally

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

Appellant was convicted of murder. He moved to dismiss the indictment against him because of alleged intimidation of witnesses; he did not object to the witnesses' testimony at trial. One witness testified that handcuffs were swung at him; the other that his glasses were bent, that the state policeman put his foot on the witness' neck and threatened to strike his testicles.

The trial court gave a cautionary instruction that the jury could disregard the testimony or give it such weight as may be appropriate. Appellant asked that the conviction be reversed based on violation of due process. *People v. Isaacson*, 378 N.E.2d 78 (N.Y. 1978).

The Court noted that unlike *Isaacson*, the trial court made no factual finding of intimidation, leaving the issue to the jury. No error here.

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

Appellant was indicted and convicted for murder thirteen years after the killings. He claimed the delay violated his right to due process in that several witnesses had died, work records were destroyed, certain prosecution evidence was destroyed, the crime scene had changed, certain state's witnesses were not subject to investigation, and a van in which the victims were found was scrapped. See *State ex rel. Leonard v. Hey*, 269 S.E.2d 394 (1980).

Syl. pt. 5 - "A delay of eleven years between the commission of a crime and the arrest or indictment of a defendant, his location and identification having been known throughout the period, is presumptively prejudicial to the defendant and violates his right to due process of law, *U.S. Const.* Amend. XIV, and *W.Va. Const.* art. 3, § 10. The presumption is rebuttable by the government." Syl. Pt. 1, *State ex rel. Leonard v. Hey*, 269 S.E.2d 394 (W.Va. 1980).

## RIGHT TO SPEEDY TRIAL

### Generally (continued)

***State v. Beard***, (continued)

The Court noted that in *Hey* the prosecution had the evidence during an eleven year time; here, witnesses did not come forward until 1992. *Hundley v. Ashworth*, 181 W.Va. 379, 382 S.E.2d 573 (1989) did not apply *Hey* because the prosecution did not know the identity or location of the defendant. The Court found the delay here was attributable to investigative work; no claim was made of lack of due diligence in indicting appellant once sufficient facts were known. See *State v. Carrico*, 189 W.Va. 40, 427 S.E.2d 474 (1993). No error.

### Standard for determining

***State ex rel. Waldron v. Stephens***, 457 S.E.2d 117 (1995) (Per Curiam)

Petitioner sought writ of prohibition to prevent his trial on malicious assault, claiming the state violated the three-term rule in *W.Va. Code*, 62-3-21. Petitioner was indicted 16 June 1992; the trial was continued from 17 September 1992 to 1 December 1992 due to a conflict with counsel. By motion, it was further continued to February 1993. That date was also continued due to failure of the prosecution to release blood test results. The trial was not rescheduled and petitioner was not recalled until October, 1994.

Syl. pt. 1 - " 'It is the three-term rule, *W.Va. Code*, 62-3-21 [1959], which constitutes the legislative pronouncement of our speedy trial standard under Article III, Section 14 of the *West Virginia Constitution*.' Syl. Pt. 1, *Good v. Handlan*, 176 W.Va. 145, 342 S.E.2d 111 (1986)." Syl. Pt. 2, *State v. Carrico*, 189 W.Va. 40, 427 S.E.2d 474 (1993).

Syl. pt. 2 - " 'The three regular terms of a court essential to the right of a defendant to be discharged from further prosecution, pursuant to provisions of the *Code*, 62-3-21, as amended, are regular terms occurring [sic] subsequent to the ending of the term at which the indictment against him is found. The term at which the indictment is returned is not to be counted in favor of the discharge of a defendant.' Syl. pt. 1, *State ex rel. Smith v. DeBerry*, 146 W.Va. 534, 120 S.E.2d 504 (1961)." Syl. Pt. 4, *State v. Carrico*, 189 W.Va. 40, 427 S.E.2d 474 (1993).

**Standard for determining** (continued)

***State ex rel. Waldron v. Stephens***, (continued)

Here, the case was originally continued on motion of the prosecution. During the February, 1992 term petitioner's motion continued the trial. No action was taken during the June, 1993, October, 1993 and February, 1994 terms of court. Four terms elapsed. Writ granted.

## RIGHT TO TRIAL

### Jury

#### Right to impartial

***State v. Derr***, 451 S.E.2d 731 (1994) (Cleckley, J.)

See VENUE Change of venue, Sufficiency of proof for, (p. 698) for discussion of topic.

### Procedure for appeal

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

See HABEAS CORPUS Distinguished from appeal, (p. 325) for discussion of topic.

## SEARCH AND SEIZURE

### Consent to search

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

See SEARCH AND SEIZURE Warrantless search, Consent to, (p. 587) for discussion of topic.

### Investigatory stop

***Carte v. Cline***, 460 S.E.2d 48 (1995) (Fox, J.)

See DRIVING UNDER THE INFLUENCE Sobriety check points, Notice of intent to challenge, (p. 193) for discussion of topic.

***State v. Stuart***, 452 S.E.2d 886 (1994) (Cleckley, J.)

See SEARCH AND SEIZURE Warrantless search, Probable cause to stop for, (p. 590) for discussion of topic.

### Sobriety check points

#### Distinguished from license and registration check

***State v. Davis***, 464 S.E.2d 598 (1995) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Sobriety check points, (p. 191) for discussion of topic.

#### Notice of intent to challenge

***Carte v. Cline***, 460 S.E.2d 48 (1995) (Fox, J.)

See DRIVING UNDER THE INFLUENCE Sobriety check points, Notice of intent to challenge, (p. 193) for discussion of topic.

## SEARCH AND SEIZURE

### Warrant

#### Challenge at preliminary hearing

***State ex rel. Brown v. Dietrick***, 444 S.E.2d 47 (1994) (Miller, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 579) for discussion of topic.

#### Probable cause for

***State ex rel. Brown v. Dietrick***, 444 S.E.2d 47 (1994) (Miller, J.)

Petitioners in this habeas corpus proceeding challenged the validity of a search warrant issued by a magistrate because the magistrate was married to the chief of police whose officer procured the warrant. The trial court determined a violation of Canon 3C(1) and 3C(1)(d) of the *Judicial Code of Ethics*.

Syl. pt. 1 - "The constitutional guarantee under *W.Va.Const.*, Article III, § 6 that no search warrant will issue except on probable cause goes to substance and not to form; therefore, where it is conclusively proved that a magistrate acted as a mere agent of the prosecutorial process and failed to make an independent evaluation of the circumstances surrounding a request for a warrant, the warrant will be held invalid and the search will be held illegal." Syllabus Point 2, *State v. Dudick*, 158 W.Va. 629, 213 S.E.2d 458 (1975).

Syl. pt. 2 - Canon 3C(1) of the *Judicial Code of Ethics* contains an initial general admonition that a judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. This admonition is followed by a number of specific instances when disqualification is required. Canon 3C(1) also recognizes that the enumerated instances are not to be considered as exclusive.

Syl. pt. 3 - "[W]here a challenge to a judge's impartiality is made for substantial reasons which indicate that the circumstances offer a possible temptation to the average man as a judge not to hold the balance nice, clear and true between the State and the accused, a judge should recuse himself." Syl. Pt. 14, *in part*, *Louk v. Haynes*, 159 W.Va. 482, 223 S.E.2d 780 (1976).

***State ex rel. Brown v. Dietrick***, (continued)

Syl. pt. 4 - The fact that a magistrate's spouse is the chief of police of a small police force does not automatically disqualify the magistrate, who is otherwise neutral and detached, from issuing a warrant sought by another member of such police force.

Syl. pt. 5 - The *West Virginia Rules of Criminal Procedure* provide a right to a defendant to challenge the validity of a search warrant in a felony case. However, this challenge may not be made at the preliminary hearing. Rule 5.1(a) of the *West Virginia Rules of Criminal Procedure* states, in part: "Objections to evidence on the ground that it was acquired by unlawful means are not properly made at the preliminary examination. Motions to suppress must be made to the trial court as provided in Rule 12."

Syl. pt. 6 - In a misdemeanor case, a defendant may attack the validity of a search warrant though a motion under Rule 12 of the *Rules of Criminal Procedure for Magistrate Courts of West Virginia*.

Syl. pt. 7 - The rule of necessity is an exception to the disqualification of a judge. It allows a judge who is otherwise disqualified to handle the case to preside if there is no provision that allows another judge to hear the matter.

Syl. pt. 8 - The rule of necessity is an exception to the general rule precluding a disqualified judge from hearing a matter. Therefore, it is strictly construed and applied only when there is no other person having jurisdiction to handle the matter that can be brought in to hear it.

Here, the issuing magistrate was not related to the officer seeking the warrant, nor did the officer in any way consult with or involve the magistrate's husband. No actual prejudice was shown.

***State ex rel. Brown v. Dietrick***, (continued)

The Court cautioned the magistrate to severely curtail any hearing of criminal actions arising from investigations by the particular police force in question. The Court also noted that a habeas corpus action is inappropriate for these issues; the matter should have been raised through a Rule 12(b) motion to suppress prior to trial (not at a preliminary hearing). *W.Va.R.Crim.P.*, Rule 12(b). (Note: despite the syllabus point above, the text notes Rule 5(b) is to be used in misdemeanor cases.)

The Court allowed issuance of the warrant under the rule of necessity, finding that it should be used only sparingly, and should not be used where the magistrate court's husband is directly involved in the case. Reversed and remanded.

***State v. Lilly***, 461 S.E.2d 101 (1995) (Fox, J.)

Appellant was convicted of various charges relating to manufacture and possession of controlled substances. The affidavit on which a search warrant was issued said only that a reliable informant told the police officer that appellant was growing marijuana at his residence. The police officer claimed he spoke to the informant, who told him the informant had seen the plants within the preceding five days and that appellant told the informant the plants were marijuana.

At a subsequent suppression hearing the magistrate testified she did not record any testimony or have a court reporter present. Appellant's objection to the magistrate's taking evidence beyond the "four corner" of the affidavit was overruled. The investigating officer testified he had no personal knowledge of the informant's reliability or truthfulness.

**Warrant** (continued)

**Probable cause for** (continued)

***State v. Lilly***, (continued)

Syl. pt. 1 - To successfully challenge the validity of a search warrant on the basis of false information in the warrant affidavit, the defendant must establish by a preponderance of the evidence that the affiant, either knowingly and intentionally or with reckless disregard for the truth, included a false statement therein. The same analysis applies to omissions of fact. The defendant must show that the facts were intentionally omitted or were omitted in reckless disregard of whether their omission made the affidavit misleading.

Syl. pt. 2 - A search warrant affidavit is not invalid even if it contains a misrepresentation, if, after striking the misrepresentation, there remains sufficient content to support a finding of probable cause. Probable cause is evaluated in the totality of the circumstances.

Syl. pt. 3 - Probable cause for the issuance of a search warrant exists if the facts and circumstances provided to a magistrate in a written affidavit are sufficient to warrant the belief of a prudent person of reasonable caution that a crime has been committed and that the specific fruits, instrumentalities, or contraband from that crime presently may be found at a specific location. It is not enough that a magistrate believes a crime has been committed. The magistrate also must have a reasonable belief that the place or person to be searched will yield certain specific classes of items. There must be a nexus between the criminal activity and the place or person searched and thing seized. The probable cause determination does not depend solely upon individual facts; rather, it depends on the cumulative effect of the facts in the totality of circumstances.

**SEARCH AND SEIZURE**

**Warrant** (continued)

**Probable cause for** (continued)

***State v. Lilly***, (continued)

Syl. pt. 4 - A key issue in determining whether information provided by an informant is sufficient to establish probable cause is whether the information is reliable. An informant may establish the reliability of his information by establishing a track record of providing accurate information. However, where a previously unknown informant provides information, the informant's lack of a track record requires some independent verification to establish the reliability of the information. Independent verification occurs where the information (or aspects of it) is corroborated by independent observations of the police officers.

The Court found no independent corroboration here, either as to the facts asserted in the affidavit, or as to the informant's reliability. The issue of the "good faith" exception to the warrant requirement was not discussed. Reversed and remanded.

**Sufficiency of**

***State v. Lilly***, 461 S.E.2d 101 (1995) (Fox, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 581) for discussion of topic.

**Warrantless arrest**

**Citizen's arrest**

***State v. Farmer***, 454 S.E.2d 378 (1994) (McHugh, J.)

See ARREST Citizen's arrest, (p. 46) for discussion of topic.

## SEARCH AND SEIZURE

### Warrantless arrest (continued)

#### Sobriety check points

***State v. Davis***, 464 S.E.2d 598 (1995) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Sobriety check points, (p. 191) for discussion of topic.

### Warrantless search

#### Consent to

***State v. Buzzard***, 461 S.E.2d 50 (1995) Workman, J.)

Appellant was convicted of breaking and entering, grand larceny and conspiracy to commit breaking and entering. Late on the evening of 2 January 1992, the local sheriff responded to a call from a security guard at a closed manufacturing facility. The sheriff found two persons in a van registered in appellant's name, along with industrial circuit breaker boxes in the van and another disconnected on the plant floor.

The sheriff went to the only motel in town and was told by the desk clerk that appellant had checked in at 1:00 a.m. Without obtaining a warrant, the sheriff and two other police officers knocked on the door. Appellant let them in, claiming the other two persons in the van had let him off at the motel and had not returned. The sheriff later testified that he noticed shoes on the floor which appeared to have the same tread as those in footprints on the plant floor. He seized the shoes and arrested appellant. Evidence seized later pursuant to a warrant tended to implicate appellant.

The suppression hearing held pursuant to appellant's codefendants' case was made part of the record in this case. Police testimony in that hearing, repeated in appellant's own hearing, indicated appellant voluntarily allowed police to enter his motel room. At his own hearing, however, appellant claimed the entry was forced.

***State v. Buzzard***, (continued)

The state argued on appeal that even if the entry were forced, the evidence was admissible as incident to lawful arrest, as within plain view and was seized pursuant to exigent circumstances.

Syl. pt. 1 - "The general rule is that the voluntary consent of a person who owns or controls premises to a search of such premises is sufficient to authorize such search without a search warrant, and that a search of such premises, without a warrant, when consented to, does not violate the constitutional prohibition against unreasonable searches and seizures." Syl. Pt. 8, *State v. Plantz*, 155 W.Va. 24, 180 S.E.2d 614 (1971), *overruled in part on other grounds* by *State ex el. White v. Mohn*, 168 W.Va. 211, 283 S.E.2d 914 (1981).

Syl. pt. 2 - " 'Whether a consent to a search is in fact voluntary or is the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." Syllabus Point 8, *State v. Craft*, 165 W.Va. 741, 272 S.E.2d 46 (1980)." Syl. Pt. 4, *State v. Worley*, 179 W.Va. 403, 369 S.E.2d 706, *cert. denied*, 488 U.S. 895, 109 S.Ct. 236, 102 L.Ed.2d 226 (1988).

Syl. pt. 3 - The circuit court, and this Court on review, should consider the following six criteria when evaluating the voluntariness of a defendant's consent: 1) the defendant's custodial status; 2) the use of duress or coercive tactics by law enforcement personnel; 3) the defendant's knowledge of his right to refuse to consent; 4) the defendant's education and intelligence; 5) the defendant's belief that no incriminating evidence will be found; and 6) the extent and level of the defendant's cooperation with the law enforcement personnel. While each of these criteria is generally relevant in analyzing whether consent is given voluntarily, no one factor is dispositive or controlling in determining the voluntariness of consent since such determinations continue to be based on the totality of the circumstances.

***State v. Buzzard***, (continued)

Syl. pt. 4 - "A trial court has the authority to reconsider and set aside its prior order granting a defendant's motion to suppress a confession when presented with new or additional evidence that would have a substantial effect on the court's ruling." Syllabus, *Thompson v. Steptoe*, 179 W.Va. 199, 366 S.E.2d 647 (1988).

The Court noted that seizure incident to a lawful arrest can only be made if probable cause to arrest existed. *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *State v. Farley*, 167 W.Va. 620, 280 S.E.2d 234 (1981). Further, the fruits of the search cannot justify the arrest. *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980).

Exigent circumstances exist where there is a compelling need and insufficient time to obtain a warrant. *Michigan v. Tyler*, 436 U.S. 499 (1978). Where police believe their own safety or that of others is threatened, or where quick action is necessary to avoid loss of the evidence or prevent the suspect from fleeing, warrants are unnecessary. *State v. Mullins*, 177 W.Va. 531, 355 S.E.2d 24 (1987). Police made no such showing here.

Consent to enter was the determinative issue here; and that consent must be "more than 'mere submission to authority.'" *State v. Fellers*, 165 W.Va. 253, 267 S.E.2d 738 (1980). See also, *State v. Basham*, 159 W.Va. 404, 223 S.E.2d 53 (1976) (awareness of right to refuse important); *State v. Williams*, 162 W.Va. 309, 249 S.E.2d 738 (1978) (education and intelligence are relevant factors); and *State v. Justice*, 191 W.Va. at 268, 445 S.E.2d 202 at 209 (1994) (cooperation with police important). Insufficient evidence was presented to determine if search was proper; reversed and remanded.

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

Appellant was convicted of first-degree murder. The evidence showed that she went in her car to a beer joint with two men, one of whom struck the victim with a baseball bat at appellant's direction; appellant robbed the victim after the attack.

Police found appellant's car with the two men in it parked in front of appellant's residence and seized the car. Appellant went to the police station to ask for the return of the vehicle. She was told that police were seeking a warrant to search the vehicle but that she could consent to a search. Unless she consented to a search, the vehicle would not be released until after the warrant was obtained.

Police read a consent to search form to appellant and she voluntarily signed the form indicating her consent. The murder weapon and substantial funds were found in the car. The trial court held a suppression hearing and admitted the weapon and money as evidence.

Syl. pt. 3 - "The general rule is that the voluntary consent of a person who owns or controls premises to a search of such premises is sufficient to authorize such search without a search warrant, and that a search of such premises, without a warrant, when consented to, does not violate the constitutional prohibition against unreasonable searches and seizures." Syllabus point 8, *State v. Plantz*, 155 W.Va. 24, 180 S.E.2d 614 (1971).

The Court noted the voluntariness of the consent to search is to be determined from the totality of the circumstances. *State v. Worley*, 179 W.Va. 403, 369 S.E.2d 706 (1988), *cert. denied*, 488 U.S. 895, 109 S.Ct. 236, 102 L.Ed.2d 226 (1988). Consent found. No error.

## SEARCH AND SEIZURE

### Warrantless search (continued)

#### Incident to investigative stop

***Hill v. Cline***, 457 S.E.2d 113 (1995) (Neely, J.)

See SEARCH AND SEIZURE Warrantless search, Probable cause for, (p. 588) for discussion of topic.

#### Probable cause for

***Hill v. Cline***, 457 S.E.2d 113 (1995) (Neely, J.)

Appellant's driver's license was revoked for ten years for driving under the influence. A policeman was investigating a call from a female store clerk regarding violence when she pointed to a passing car, identifying the driver as the perpetrator.

The officer stopped the car to "check on Mr. Hill's attitude and general demeanor;" he detected the odor of alcohol and noticed Mr. Hill's speech was slurred. Mr. Hill failed several field sobriety tests and was arrested for DUI. He was transported to the police station, given *Miranda* warnings and refused to take a breathalyzer test. On appeal he alleged no probable cause to stop.

Syl. pt. 1 - "Police officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime. To the extent *State v. Meadows*, 170 W.Va. 191, 292 S.E.2d 50 (1982), holds otherwise, it is overruled." Syllabus Point 1, *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994).

Syl. pt. 2 - "When evaluating whether or not particular facts established reasonable suspicion, one must examine the totality of the circumstances, which includes both the quantity and quality of the information known by the police." Syllabus Point 2, *State v. Stuart*, 192 W.Va. 428, 452 S.E.2d 886 (1994).

***Hill v. Cline***, (continued)

Syl. pt. 3 - "If the police merely question a suspect on the street without detaining him against his will, Section 6 of Article III of the *West Virginia Constitution* is not implicated and no justification for the officer's conduct need be shown. At the point where a reasonable person believes he is being detained and is not free to leave, then a stop has occurred and Section 6 of Article III is triggered, requiring that the officer have reasonable suspicion that criminal activity is afoot. If the nature and duration of the detention arise to the level of full-scale arrest or its equivalent, probable cause must be shown. Thus, the police cannot seize an individual, involuntarily take him to a police station, and detain him for interrogation purposes while lacking probable cause to make an arrest." Syl. pt. 2, *State v. Jones*, 193 W.Va. 378, 456 S.E.2d 459 (1995).

Syl. pt. 4 - "An automobile may be stopped for some legitimate state interest. Once the vehicle is lawfully stopped for a legitimate state interest, probable cause may arise to believe the vehicle is carrying weapons, contraband or evidence of the commission of a crime, and, at this point, if exigent circumstances are present, a warrantless search may be made." Syllabus Point 4, *State v. Moore*, 165 W.Va. 837, 272 S.E.2d 804 (1980), *overruled on other grounds*, *State v. Julius*, 185 W.Va. 422, 408 S.E.2d 1 (1991).

The Court noted probable cause is not necessary for an initial stop because of the limited nature of an investigative stop under *Terry v. Ohio*, 392 U.S. 1 (1968). Here, the officer had probable cause to arrest following the stop, even though the initial stop was unrelated to the arrest. No error.

**Warrantless search** (continued)

**Probable cause to stop for**

***State v. Stuart***, 452 S.E.2d 886 (1994) (Cleckley, J.)

Appellant was convicted of second-offense driving under the influence. Pursuant to a call to an emergency dispatch service (911), police responded to the area wherein a person was alleged to be driving erratically. (The tape of this call was apparently played to the trial court but was erased prior to trial and never admitted to evidence; similarly, a videotape of the actual stop was also erased. In both cases, department policy called for routine erasure after a given period.)

Both of the officers responding testified that the dispatcher told them the caller described a red Mercury Grand Marquis, West Virginia license plate 1FG-953. They testified that appellant passed them going in the opposite direction. Appellant's speed was noted at 25 miles per hour in a 35 mile per hour zone. Based on his slow speed, the time of day (approximately 1:00 a.m.) and the day (Sunday morning/Saturday night) the officers stopped appellant.

They further testified that appellant smelled strongly of alcohol, was given and failed a field sobriety test, placed under arrest and given a breath test. Appellant's blood alcohol level was .215%, which result he did not contest. The trial court ruled that the anonymous call was insufficient reason to stop appellant but that appellant's slow speed and the hour of the night gave probable cause.

Appellant objected to the lack of probable cause to stop; and claimed the absence of the audio and video tapes deprived him of exculpatory evidence.

Syl. pt. 1 - Police officers may stop a vehicle to investigate if they have an articulable reasonable suspicion that the vehicle is subject to seizure or a person in the vehicle has committed, is committing, or is about to commit a crime. To the extent *State v. Meadows*, 170 W.Va. 191, 292 S.E.2d 50 (1982), holds otherwise, it is overruled.

***State v. Stuart***, (continued)

Syl. pt. 2 - When evaluating whether or not particular facts establish reasonable suspicion, one must examine the totality of the circumstances, which includes both the quantity and quality of the information known by the police.

Syl. pt. 3 - On appeal, legal conclusions made with regard to suppression determinations are reviewed *de novo*. Factual determinations upon which these legal conclusions are based are reviewed under the clearly erroneous standard. In addition, factual findings based, at least in part, on determinations of witness credibility are accorded great deference.

Syl. pt. 4 - A police officer may rely upon an anonymous call if subsequent police work or other facts support its reliability and, thereby, it is sufficiently corroborated to justify the investigatory stop under the reasonable-suspicion standard.

The Court distinguished the need for probable cause from the mere reasonable suspicion necessary to make an investigatory stop, cf. *State v. Meadows*, 170 W.Va. 191, 292 S.E.2d 50 (1982), and applied the reasonable suspicion standard here. See *Alabama v. White*, 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990). The result is a lesser standard of reliability of the informant.

As to the totality of the circumstances giving rise to reasonable suspicion, the Court ruled that the circumstances observed by the police were insufficient standing alone; both the anonymous call and the corroboration observed were necessary to justify the stop.

The Court found that the minor inconsistencies between the information relayed by the anonymous caller and those observed by the police were insufficient to be considered exculpatory; further, appellant could have called the dispatchers to testify. Even worse, appellant did not object to the videotape's destruction at trial.

**Warrantless search** (continued)

**Sobriety check points**

***State v. Davis***, 464 S.E.2d 598 (1995) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Sobriety check points, (p. 191) for discussion of topic.

**SELF-DEFENSE**

**Burden of proof**

**Prosecution's after prima facie**

***State v. McClanahan***, 454 S.E.2d 115 (1994) (Per Curiam)

Appellant was convicted of unlawful wounding. She claimed that the evidence showed self-defense and that the State's evidence was insufficient to convict.

Appellant shot her husband during a domestic argument about her alleged affair with another man. At trial the husband testified that he had been abusive to appellant and believed appellant was justified in shooting him.

Syl. pt. 1 - "Once there is sufficient evidence to create a reasonable doubt that the killing resulted from the defendant acting in self-defense, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense." Syllabus point 4, *State v. Kirtley*, 162 W.Va. 249, 252 S.E.2d 374 (1978).

The Court noted the fear of harm must exist at the time of the attack, not be derived from pre-existing fear. Syllabus point 6, *State v. McMillion*, 104 W.Va. 1, 138 S.E. 732 (1927). More importantly, the State must prove the defendant did not act in self-defense; the State need not, however, introduce specific rebuttal evidence to appellant's specific claims. Evidence here could have been construed by the jury to prove appellant did not act in immediate fear of harm, but rather from a long-standing apprehension. No error.

## SELF-INCRIMINATION

### Consent to search

#### Voluntariness

***Hill v. Cline***, 457 S.E.2d 113 (1995) (Neely, J.)

See SEARCH AND SEIZURE Warrantless search, Probable cause for, (p. 588) for discussion of topic.

### Statements by defendant

***State v. Jones***, 456 S.E.2d 459 (1995) (Cleckley, J.)

Appellant was convicted of being a principal in the second-degree in a first-degree murder. After a day-long drinking spree, appellant and two others engaged in an argument resulting in the victim's beating. Believing the victim dead, they locked him in the trunk of their car and went to a friend's home.

After washing the blood from their hands, the remaining two drove the still-living victim to a remote area and released him from the trunk after the car became stuck in mud. There the principal strangled the victim. He later confessed to a friend.

Several days later, a state policeman went to appellant's home and appellant voluntarily spoke with him. Appellant was not given *Miranda* rights. He denied any knowledge of the victim's whereabouts. The trooper asked appellant to show him where the principal lived. They walked from there to where the car used was still stuck in the mud. Two other troopers were at the scene, looking for the body. One gave appellant *Miranda* rights. Appellant claimed he knew nothing.

Appellant was transported to the police station where a fourth trooper, noticing appellant was upset, asked him if he would like to talk. No *Miranda* warnings were given. Appellant began crying and admitted to hitting the victim during the original beating, putting him in the trunk and holding him while the principal strangled him. Appellant claimed on appeal that probable cause existed to arrest when he was first taken from his home and that his confession was inadmissible because of the delay in presenting him before a magistrate.

**Statements by defendant** (continued)

***State v. Jones***, (continued)

Syl. pt. 1 - "Where police, lacking probable cause to arrest, ask suspects to accompany them to police headquarters and then interrogate them . . . during which time they are not free to leave or their liberty is restrained, the police have violated the Fourth Amendment." Syllabus Point 1, in part, *State v. Stanley*, 168 W.Va. 294, 284 S.E.2d 367 (1981).

Syl. pt. 2 - If the police merely question a suspect on the street without detaining him against his will, Section 6 of Article III of the *West Virginia Constitution* is not implicated and no justification for the officer's conduct need be shown. At the point where a reasonable person believes he is being detained and is not free to leave, then a stop has occurred and Section 6 of Article III is triggered, requiring that the officer have reasonable suspicion that criminal activity is afoot. If the nature and duration of the detention arise to the level of a full-scale arrest or its equivalent, probable cause must be shown. Thus, the police cannot seize an individual, involuntarily take him to a police station, and detain him for interrogation purposes while lacking probable cause to make an arrest.

Syl. pt. 3 - "Limited police investigatory interrogations are allowable when the suspect is expressly informed that he is not under arrest, is not obligated to answer questions and is free to go." Syllabus Point 2, *State v. Mays*, 172 W.Va. 486, 307 S.E.2d 655 (1983).

Syl. pt. 4 - "A confession obtained by exploitation of an illegal arrest is inadmissible. The giving of *Miranda* warnings is not enough, by itself, to break the causal connection between an illegal arrest and the confession. In considering whether the confession is a result of the exploitation of an illegal arrest, the court should consider the temporal proximity of the arrest and confession; the presence or absence of intervening circumstances in addition to the *Miranda* warnings; and the purpose of flagrancy of the official misconduct." Syllabus Point 2, *State v. Stanley*, 168 W.Va. 294, 284 S.E.2d 367 (1981).

**Statements by defendant** (continued)

***State v. Jones***, (continued)

The Court found the police took appellant to the police station without his consent and without probable cause to arrest him. He was held for approximately three hours at the station, excessive for mere investigative purposes. Further, it was admitted by the state that appellant believed he was not free to leave. One trooper testified that he believed appellant to be in custody before transport; the Court found that belief irrelevant. *Stansbury v. California*, 114 S.Ct. 1526, 1530, 128 L.Ed.2d 293, 300 (1994).

Further, the Court found the improper police conduct was so bound up with the interrogation that "attenuation" did not take place sufficient to purge the taint. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Nardone v. United States*, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed.2d (1939). Reversed and remanded.

## SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

### Confessions

#### Admissibility

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

Appellant was indicted on charges of murder and aggravated robbery. In a first trial, he was found guilty of second-degree murder but innocent of aggravated robbery; following a mistrial on charges of second-degree murder of a second victim, he was found guilty of first-degree murder in the second death.

Appellant killed a pawn shop owner and his wife; he claimed self-defense. After the killings, he took his wife to a mall and then to a motel. The next morning he flew to Cincinnati, planning to fly on to Houston. He was met by police in Cincinnati and was advised of his *Miranda* rights after begin told he was not under arrest. Appellant agrees that he voluntarily went with the police to their office. He voluntarily executed a waiver of rights after again being advised of his *Miranda* rights. Upon the arrival of West Virginia police, he was advised of his rights a third time and executed a second waiver. The subsequent interview was videotaped.

Appellant agreed to a polygraph examination but the West Virginia policeman had difficulty obtaining an examiner. He advised appellant of several options. Appellant told the policeman he wanted to leave but agreed to wait until the policeman telephoned back to West Virginia. Following a twenty minute wait, appellant was informed he was under arrest; he was given *Miranda* rights a fourth time and executed a third waiver. He then admitted the killings but claimed self-defense. He claimed on appeal that questioning should have ceased, that he was denied requested counsel and that his confession and the videotaped interview should have been inadmissible.

Syl. pt. 1 - The burden is on the State to prove by a preponderance of the evidence that extrajudicial inculpatory statements were made voluntarily before the statements can be admitted into evidence against one charged with or suspected of the commission of a crime.

Syl. pt. 2 - Whether an extrajudicial exculpatory statement is voluntary or the result of coercive police activity is a legal question to be determined from a review of the totality of the circumstances.

**SELF-INCRIMINATION/STATEMENTS BY DEFENDANT**

**Confessions** (continued)

**Admissibility** (continued)

***State v. Bradshaw***, (continued)

Syl. pt. 3 - To the extent that any of our prior cases could be read to allow a defendant to invoke his *Miranda* rights outside the context of custodial interrogation, the decisions are no longer of precedential value.

Syl. pt. 4 - Where police have given *Miranda* warnings outside the context of custodial interrogation, these warnings must be repeated once custodial interrogation begins. Absent an effective waiver of these rights, interrogation must cease.

Syl. pt. 5 - " ' "Once a person under interrogation has exercised the right to remain silent guaranteed by *W.Va. Const*, art. III §5, and *U.S. Const*. amend. V, the police must scrupulously honor that privilege. The failure to do so renders subsequent statements inadmissible at trial." Syllabus Point 3, *State v. Rissler*, 165 W.Va. 640, 270 S.E.2d 778 (1980).' Syllabus Point 1, *State v. Woodson*, 181 W.Va. 325, 382 S.E.2d 519 (1989)." Syllabus Point 4, *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994).

Syl. pt. 6 - "To assert the *Miranda* right to terminate police interrogation, the words or conduct must be explicitly clear that the suspect wishes to terminate all questioning and not merely a desire not to comment on or answer a particular question." Syllabus Point 5, *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994).

Syl. pt. 7 - When evaluating the voluntariness of a confession, a determination must be made as to whether the defendant knowingly and intelligently waived his constitutional rights and whether the confession was the product of an essentially free and unconstrained choice by its maker.

Syl. pt. 8 - " 'Misrepresentations made to a defendant or other deceptive practices by police officers will not necessarily invalidate a confession unless they are shown to have affected its voluntariness or reliability.' Syllabus Point 6, *State v. Worley*, 179 W.Va. 403, 369 S.E.2d 706 (1988)." Syllabus Point 6, *State v. Farley*, 192 W.Va. 247, 452 S.E.2d 50 (1994).

**Confessions** (continued)

**Admissibility** (continued)

***State v. Bradshaw***, (continued)

The Court noted appellant's requests for counsel were ambiguous at best. When police ask follow-up questions for clarity, as they did here, interrogation can proceed if the suspect does not clearly request counsel. Further, until a suspect is in custody, any attempt to invoke the right to counsel is "an empty gesture." See *McNeil v. Wisconsin*, 501 U.S. 171, 182, 111 S.Ct. 2204, 2211, 115 L.Ed.2d 158, 171 (1991). Absent the combination of custody and interrogation *Miranda* rights are not invoked.

Here, police were very careful to remind appellant of his *Miranda* rights and he executed several written waivers. Further, police comments were an attempt to create a favorable climate for confession; no coercion was used. No error.

***State v. Buzzard***, 461 S.E.2d 50 (1995) Workman, J.)

See SEARCH AND SEIZURE Warrantless search, Consent to, (p. 584) for discussion of topic.

***State v. Farley***, 452 S.E.2d 50 (1994) (Cleckley, J.)

Appellant was convicted of arson, and falsely reporting an emergency. Upon receipt of a false fire alarm, the local police chief identified appellant as the caller. At police request, appellant went to police headquarters for questioning.

Appellant was given his *Miranda* rights and signed a waiver form. He was told he was not under arrest and could leave at any time. A polygraph exam was given and the police chief, the examiner and an arson investigator then questioned appellant. Appellant admitted placing the false alarm call after hearing a tape from the 911 center. He later confessed to setting various fires.

**Confessions** (continued)

**Admissibility** (continued)

***State v. Farley***, (continued)

Upon arrival of a deputy sheriff, appellant was again given his *Miranda* rights. Appellant refused to answer questions without a lawyer present. He was arrested. At trial his confession was admitted to evidence without comment by the trial judge. Appellant recanted, testifying that he was promised "things" and that the police said "we'll get you help." He admitted on cross-examination that he was not persuaded by these offers.

Syl. pt. 1 - " ' "A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syllabus Point 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).' Syl. pt. 7, *State v. Hickman*, 175 W.Va. 709, 338 S.E.2d 188 (1985)." Syllabus Point 2, *State v. Stewart*, 180 W.Va. 173, 375 S.E.2d 805 (1988).

Syl. pt. 2 - This Court is constitutionally obligated to give plenary, independent, and *de novo* review to the ultimate question of whether a particular confession is voluntary and whether the lower court applied the correct legal standard in making its determination. The holdings of prior West Virginia cases suggesting deference in this area continue, but that deference is limited to factual findings as opposed do legal conclusions.

Syl. pt. 3 - In circumstances where a trial court admits a confession without making specific findings as to the totality of the circumstances, the admission of the confession will nevertheless be upheld on appeal, but only if a reasonable review of the evidence clearly supports voluntariness.

Syl. pt. 4 - " 'Once a person under interrogation has exercised the right to remain silent guaranteed by *W.Va. Const.*, art. III § 5, and *U.S. Const.* amend. V, the police must scrupulously honor that privilege. The failure to do so renders subsequent statements inadmissible at trial.' Syllabus Point 3, *State v. Rissler*, 165 W.Va. 640, 270 S.E.2d 778 (1980)." Syllabus Point 1, *State v. Woodson*, 181 W.Va. 325, 382 S.E.2d 519 (1989).

**Confessions** (continued)

**Admissibility** (continued)

***State v. Farley***, (continued)

Syl. pt. 5 - To assert the *Miranda* right to terminate police interrogation, the words or conduct must be explicitly clear that the suspect wishes to terminate all questioning and not merely a desire not to comment on or answer a particular question.

Syl. pt. 6 - "Misrepresentations made to a defendant or other deceptive practices by police officers will not necessarily invalidate a confession unless they are shown to have affected its voluntariness or reliability." Syllabus Point 6, *State v. Worley*, 179 W.Va. 403, 369 S.E.2d 706 (1988).

Syl. pt. 7 - Representations or promises to a defendant by one in authority do not necessarily invalidate a subsequent confession. In determining the voluntariness of a confession, the trial court must assess the totality of all the surrounding circumstances. No one factor is determinative. To the extent that *State v. Parsons*, 108 W.Va. 705, 152 S.E. 745 (1930), is inconsistent with this standard, it is overruled.

Voluntariness of a confession must be shown by a preponderance of the evidence. *State v. Zaccario*, 100 W.Va. 36, 129 S.E. 763 (1925). A prima facie showing is insufficient. *State v. Stewart*, 180 W.Va. 173, 375 S.E.2d 805 (1988). Voluntariness is "a legal question requiring independent ... determination." *Arizona v. Fulminante*, 499 U.S. 279, 287, 111 S.Ct. 1246, 1252, 113 L.Ed.2d 302, 316 (1991).

The Court noted the ample testimony to demonstrate the reliability of the confession; absence of trial court's findings not fatal. The transcript of the tape recorded confession showed appellant was having difficulty talking about the fires; however, he did not indicate he wanted the interrogation to end. Further, police conduct did not rise to the level of promises or threats "calculated to foment hope or despair" so as to coerce a confession. *State v. Sparks*, 171 W.Va. 320, 298 S.E.2d 857 (1982).

The Court found appellant failed to invoke his rights. No error.

**Confessions** (continued)

**Admissibility** (continued)

***State v. Honaker***, 454 S.E.2d 96 (1994) (Cleckley, J.)

See CONFESSIONS Voluntariness, (p. 153) for discussion of topic.

***State v. Hopkins***, 453 S.E.2d 317 (1994) (Neely, J.)

Appellant was convicted of shoplifting, third offense. On 26 October 1992, appellant was stopped by a security guard in a grocery store for allegedly putting two packages of cigarettes in his pocket. When confronted, appellant at first denied having taken the cigarettes but, when the guard recited the brand of cigarettes, appellant said "Man, you're slick; I didn't see you. How did you see me do that? Where were you at?" Appellant had deposited the cigarettes in another area of the store.

The guard told appellant he was under arrest, gave him his *Miranda* rights and took his picture, along with the cigarettes. Appellant gave a false name and address. On appeal, appellant objected to admission of the first statement. The security guard testified that he did not arrest appellant until after the statement was made and that appellant was not restrained in any way. The circuit court found that no interrogation was made until after the arrest; the statement was spontaneous and therefore admissible.

Syl. pt. 1 - "Volunteered admissions by a defendant are not inadmissible because the procedural safeguards of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) were not followed, unless the defendant was both in custody and being interrogated at the time the admission was uttered." Syllabus Point 2, *State v. Rowe*, 163 W.Va. 593, 259 S.E.2d 26 (1979).

Syl. pt. 2 - " 'Error in the admission of testimony to which no objection was made will not be considered by this Court on appeal or writ of error, but will be treated as waived.' Syl. pt. 4, *State v. Michael*, 141 W.Va. 1, 87 S.E.2d 595 (1955)." Syllabus Point 7, *State v. Davis*, 176 W.Va. 454, 345 S.E.2d 549 (1986).

**Confessions** (continued)

**Admissibility** (continued)

***State v. Hopkins***, (continued)

The Court noted that testimony regarding appellants' giving of false information was not objected to at trial; therefore the Court did not address whether a security guard must give *Miranda* warnings. See *State v. Muegge*, 178 W.Va. 439, 444, 360 S.E.2d 216, 221 (1987).

Warnings are usually required only where a person's freedom has been restricted. *State v. Preece*, 181 W.Va. 633, 383 S.E.2d 815 (1989). That determination is based on the objective circumstances of the interrogation, not the subjective view of either the officer or the person questioned. *Stansbury v. California*, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994). See also, *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980) for what constitutes questioning relevant to *Miranda*.

Appellant was not in custody; his statements were made in a public area. He was not touched or restrained in any way. Further his statements were clearly spontaneous. Statements here were clearly voluntary and admissible. No error.

***State v. Jameson***, 461 S.E.2d 67 (1995) (Per Curiam)

Appellant was convicted of murder pursuant to a fire at the home of his wife's grandparents. Following determination that the fire was arson, appellant went voluntarily to the city police station at 11:30 p.m. to answer questions. He was then taken to the South Charleston State Police detachment for a polygraph test and questioned at length. At 6:33 a.m. he confessed. He claimed on appeal that the confession was coerced following an illegal arrest.

Syl. pt. 1 - " 'Limited police investigatory interrogations are allowable when the suspect is expressly informed that he is not under arrest, is not obligated to answer questions and is free to go.' Syllabus Point 2, *State v. Mays*, 172 W.Va. 486, 307 S.E.2d 655 (1983)." Syllabus point 3, *State of West Virginia v. Jones*, 193 W.Va. 378, 456 S.E.2d 459 (1995).

**Confessions** (continued)

**Admissibility** (continued)

***State v. Jameson***, (continued)

Syl. pt. 2 - "It is a well-established rule of appellate review in this state that a trial court has wide discretion in regard to the admissibility of confessions and ordinarily this discretion will not be disturbed on review." Syllabus point 2, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

Syl. pt. 3 - "A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syllabus point 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

The Court noted the trial court held a lengthy suppression hearing, even viewing videotapes and hearing audio tapes of appellant's confession. In addition, a Fire Marshall investigator and a police officer testified that appellant was not under arrest when he went to the city police station. One said he informed appellant of his *Miranda* rights and that he was free to leave the police station.

Appellant did not ask for a lawyer and signed a written waiver of his *Miranda* rights. He was arrested after he gave the confession. Several police witnesses claimed appellant was free to leave until after the confession. The Court termed this interrogation as a "limited police investigatory interrogation." No illegal arrest; no showing of coercion sufficient to disturb the trial court's findings. No error.

***State v. Jones***, 456 S.E.2d 459 (1995) (Cleckley, J.)

See SELF-INCRIMINATION Statements by defendant, (p. 594) for discussion of topic.

## SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

**Confessions** (continued)

**Admissibility** (continued)

***State v. Moore***, 457 S.E.2d 801 (1995) (Neely, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Voluntariness, Intelligence a factor, (p. 608) for discussion of topic.

**Voluntariness**

***State v. Moore***, 457 S.E.2d 801 (1995) (Neely, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Voluntariness, Intelligence a factor, (p. 608) for discussion of topic.

**Confessions to police**

***State v. Honaker***, 454 S.E.2d 96 (1994) (Cleckley, J.)

See CONFESSIONS Voluntariness, (p. 153) for discussion of topic.

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See JUVENILE Self-incrimination, Waiver of right to counsel, (p. 447) for discussion of topic.

**Delay in taking before a magistrate**

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See JUVENILE Self-incrimination, Waiver of right to counsel, (p. 447) for discussion of topic.

## SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

### Juveniles

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See JUVENILE Self-incrimination, Waiver of right to counsel, (p. 447) for discussion of topic.

### Parental notification

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See JUVENILE Self-incrimination, Waiver of right to counsel, (p. 447) for discussion of topic.

### Psychological/psychiatric examination

#### Waiver during

***State v. Bush***, 442 S.E.2d 437 (1994) (Per Curiam)

Appellant was convicted of second-degree murder. At the request of the prosecution, he was ordered to undergo psychological evaluation prior to trial, in response to his equivocal answer to whether he intended to rely on an insanity defense.

At trial, he claimed diminished capacity to form the intent, malice and premeditation to commit first-degree murder because he was under the influence of drugs and alcohol. Further, he claimed that the psychological testimony violated his right not to incriminate himself.

One examiner testified that appellant was able to form the requisite intent. The second testified that the drugs and alcohol did not diminish appellant's ability to premeditate.

**Psychological/psychiatric examination** (continued)

**Waiver during** (continued)

***State v. Bush***, (continued)

Syl. pt. 1 - "The Fifth Amendment privilege against self-incrimination has been interpreted to provide protection only where incriminating evidence of a testimonial or communicative nature is sought from a witness through the vehicle of state compulsion." Syllabus Point 8, *Marano v. Holland*, 179 W.Va. 156, 366 S.E.2d 117 (1988).

Syl. pt. 2 - " 'Voluntary drunkenness is generally never an excuse for a crime, but where a defendant is charged with murder, and it appears that the defendant was too drunk to be capable of deliberating and premeditating, in that instance intoxication may reduce murder in the first-degree to murder in the second-degree, as long as the specific intent did not antedate the intoxication.' Syllabus Point 2, *State v. Keeton*, 166 W.Va. 77, 272 S.E.2d 817 (1980)." Syllables Point 8, *State v. Hickman*, 175 W.Va. 709, 338 S.E.2d 188 (1985).

The Court noted neither expert mentioned anything incriminating, but rather gave their opinion as to appellant's mental state and drug use. The Court dismissed appellant's argument that the testimony should have been excluded because the defense of insanity or diminished capacity was not introduced; competency was at issue. Intoxication was clearly put into evidence. No error.

**Taped conversations**

***State v. Dillon***, 447 S.E.2d 583 (1994) (Workman, J.)

See EVIDENCE Admissibility, Tape recorded statements to informant, (p. 255, 256, 257, 258, 259) for discussion of topic.

## SELF-INCRIMINATION/STATEMENTS BY DEFENDANT

### Testimony at trial

#### Reputation of accused

***State v. Roy***, 460 S.E.2d 277 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Reputation of accused, (p. 249) for discussion of topic.

### Voluntariness

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Confessions, Admissibility, (p. 597) for discussion of topic.

***State v. Honaker***, 454 S.E.2d 96 (1994) (Cleckley, J.)

See CONFESSIONS Voluntariness, (p. 153) for discussion of topic.

#### Intelligence a factor

***State v. Moore***, 457 S.E.2d 801 (1995) (Neely, J.)

Appellant was convicted of sexual abuse and burglary. He is thirty-one years old with an eighth grade education and is mentally retarded. Upon arrest, the police read his *Miranda* rights and also placed a written copy in front of him. The officer pointed to each line as he read it. Appellant then confessed but refused to give a recorded statement. He claimed he was intoxicated when he confessed. The police officer said he was unaware of appellant's physical or emotional state or that he was retarded.

Syl. pt. 3 - "It is the general rule that the intelligence of a person making a confession is but one factor to be considered in determining whether a waiver of rights was voluntary." *State v. Adkins*, 170 W.Va. 46, 53, 289 S.E.2d 720, 727 (1982).

**Voluntariness** (continued)

**Intelligence a factor** (continued)

***State v. Moore***, (continued)

Syl. pt. 4 - "A trial court's decision regarding the voluntariness of a confession will not be disturbed unless it is plainly wrong or clearly against the weight of the evidence." Syl. Pt. 3, *State v. Vance*, 162 W.Va. 467, 250 S.E.2d 146 (1978).

The Court rejected defense counsel's claim that omission of the concept that any statement could be used against him prevented appellant from making a knowing and intelligent waiver of rights. The rights form stated "... any statement you do make can be used as evidence in a court of law."

Noting that *Miranda* warnings need not be in the exact language of the case, the court found the essence of rights were communicated, that examining psychologists concluded appellant understood the charges, that appellant had an eighth grade education and he had past experience with a sexual offense. The Court distinguished *State v. Geoff*, 169 W.Va. 778, 289 S.E.2d 473 (1982), finding that *Geoff*, also retarded, was not informed of the charges and that he may have thought he was helping as an informant rather than being investigated himself. No error.

**Intoxication**

***State v. Moore***, 457 S.E.2d 801 (1995) (Neely, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Voluntariness, Intelligence a factor, (p. 608) for discussion of topic.

**Retardation**

***State v. Moore***, 457 S.E.2d 801 (1995) (Neely, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Voluntariness, Intelligence a factor, (p. 608) for discussion of topic.

**SELF-INCRIMINATION/STATEMENTS BY DEFENDANT**

**Voluntariness** (continued)

**Statements to police**

***State v. Jones***, 456 S.E.2d 459 (1995) (Cleckley, J.)

See SELF-INCRIMINATION Statements by defendant, (p. 594) for discussion of topic.

**Statements to private persons**

***State v. Honaker***, 454 S.E.2d 96 (1994) (Cleckley, J.)

See CONFESSIONS Voluntariness, (p. 153) for discussion of topic.

**Tests for**

***State v. Moore***, 457 S.E.2d 801 (1995) (Neely, J.)

See SELF-INCRIMINATION/STATEMENTS BY DEFENDANT Voluntariness, Intelligence a factor, (p. 608) for discussion of topic.

## SENTENCING

### Alternative sentencing

#### Home detention

***State v. Long***, 450 S.E.2d 806 (1994) (Miller, J.)

See SENTENCING Home detention, (p. 626) for discussion of topic.

#### Proportionality

***State v. Lewis***, 447 S.E.2d 570 (1994) (Workman, J.)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 618) for discussion of topic.

### Appeal of

#### Standard for review

***Ronnie R. v. Trent***, 460 S.E.2d 499 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 367) for discussion of topic.

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

Appellant was convicted of second and third degree sexual assault. He was sentenced to ten to twenty-five for the second-degree and one to five for the third degree conviction, resulting in a twenty-year minimum sentence. Appellant's co-defendants were given one to five. Since the co-defendants did not request a trial, appellant claimed he was punished for exercising his right to trial.

Syl. pt. 6 - " 'Sentences imposed by the trial court, if within statutory limits and if not based on some [im]permissible factor, are not subject to appellate review.' Syl. pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982)." Syllabus Point 9, *State v. Hays*, 185 W.Va. 664, 408 S.E.2d 614 (1991).

**SENTENCING**

**Appeal of** (continued)

**Standard for review** (continued)

***State v. Miller***, (continued)

The Court noted differences in sentencing between defendants originally charged with the same crimes are not sufficient to show appellant was punished for demanding a trial. See *State v. Layton*, 189 W.Va. 470, 432 S.E.2d 740 (1993).

**Appropriateness**

**Alternative sentencing**

***State v. Lewis***, 447 S.E.2d 570 (1994) (Workman, J.)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 618) for discussion of topic.

**Generally**

***State v. Woods***, 460 S.E.2d 65 (1995) (Per Curiam)

See PROPORTIONALITY Appropriateness of sentence, Generally, (p. 539) for discussion of topic.

**Comments on during closing argument**

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 544) for discussion of topic.

## SENTENCING

### Concurrent

#### Double jeopardy not cured

***State v. Hardesty***, 461 S.E.2d 478 (1995) (Fox, J.)

See DOUBLE JEOPARDY Totality of circumstances test, (p. 184) for discussion of topic.

### Cruel and unusual

#### Enhancement upon third offense

***State v. Lewis***, 447 S.E.2d 570 (1994) (Workman, J.)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 618) for discussion of topic.

### Enhancement

#### Notice of

***State v. McClanahan***, 454 S.E.2d 115 (1994) (Per Curiam)

See SENTENCING Enhancement, Use of a firearm, (p. 620) for discussion of topic.

#### Prior offense without counsel

***State v. Hopkins***, 453 S.E.2d 317 (1994) (Neely, J.)

Appellant was convicted of third offense shoplifting. He claimed error in that the circuit court did not sever his two prior convictions; and that his previous convictions were without counsel and should not be used for enhancement.

**SENTENCING**

**Enhancement** (continued)

**Prior offense without counsel** (continued)

Syl. pt. 3 - Our holding in *State v. Armstrong*, 175 W.Va. 381, 332 S.E.2d 837 (1985) is overruled because it imposes an unnecessary restriction on the use of valid uncounseled previous convictions and we find that under the sixth amendment to the *United States Constitution* and article III, section 14 of the *West Virginia Constitution*, "an uncounseled misdemeanor conviction, valid under *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979)], because no prison term was imposed, is also valid when used to enhance punishment as a subsequent conviction." *Nichols v. United States*, U.S., 114 S.Ct. 1921, 1928, 128 L.Ed.2d 745, 755 (1994).

The Court noted appellant did not object to admission of records of the two prior convictions but raised the issue in his motion for acquittal. The State presented evidence that he had pled guilty to two offenses and nolo contendere to another.

The Court noted that the U.S. Supreme Court rejected the request in *Nichols* that a warning be given that a conviction may be used for enhancement. Any conviction valid under *Scott v. Illinois*, 440 U.S. 367 (1979) as obtained without counsel because no prison term is at issue, is also valid for enhancement purposes. *Nichols*, *supra*, 114, S.Ct. at 1928, 128 L.Ed.2d at 755. See also, *Parke v. Raley*, 506 U.S. __, 113 S.Ct. 517, 121 L.Ed.2d 391 (1993) and *Curtis v. U.S.*, ___, U.S. ___, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994). No error.

**Prior offense without prison time**

***State v. Lewis***, 447 S.E.2d 570 (1994) (Workman, J.)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 618) for discussion of topic.

**SENTENCING**

**Enhancement** (continued)

**Proof of triggering offense**

***State v. Wyne***, 460 S.E.2d 450 (1995) (Miller, J.)

Appellant pled guilty to breaking and entering. Five years later he pled to second-degree arson. When he pled to jail escape pursuant to *W.Va. Code*, 61-5-10, the prior felonies were used to enhance his sentence to life imprisonment pursuant to *W.Va. Code* § 61-11-18. On appeal he claimed that the prosecution failed to prove the triggering felony and that the recidivist penalty was constitutionally disproportionate to the crimes.

Syl. pt. 1 - A life recidivist penalty may be imposed under *W.Va. Code*, 61-11-18 (1994), if the defendant has been convicted of two prior felonies in addition to the third felony which triggers the life recidivist proceeding.

Syl. pt. 2 - "In applying the recidivist life penalty, the trial court does not impose a separate sentence for the last felony conviction, but upon the jury's conviction in the recidivist proceeding it imposes a life sentence on the last felony conviction. In order to establish a life recidivist conviction, another felony must be proven beyond those for which the defendant has been previously sentence." Syllabus Point 1, *Gibson v. Legursky*, 187 W.Va. 51, 415 S.E.2d 457 (1992).

Syl. pt. 3 - Under *W.Va. Code*, 61-11-19 (1943) a recidivist proceeding does not require proof of the triggering offense because such triggering offense must be proven prior to the invocation of the recidivist proceeding. At the recidivist proceeding, proof of the prior felony or felonies conviction that are used to establish the recidivist conviction must be shown. Such recidivist conviction will then be used to enhance the penalty of the underlying triggering conviction.

**SENTENCING**

**Enhancement** (continued)

**Proof of triggering offense** (continued)

***State v. Wyne***, (continued)

Syl. pt. 4 - " 'The appropriateness of a life recidivist sentence under our constitutional proportionality provision found in Article III, Section 5 [of the *West Virginia Constitution*], will be analyzed as follows: We give initial emphasis to the nature of the final offense which triggers the recidivist life sentence, although consideration is also given to other underlying convictions. The primary analysis of these offenses is to determine if they involve actual or threatened violence to the person since crimes of this nature have traditionally carried the more serious penalties and therefore justify application of the recidivist statute.' Syl. Pt. 7, *State v. Beck*, 167 W.Va. 830, 286 S.E.2d 234 (1981)." Syllabus Point 2, *State v. Housden*, 184 W.Va. 171, 399 S.E.2d 882 (1990).

The last felony here involved actual violence to a jailor; similarly, second-degree arson is a serious offense. No proportionality error, no need to prove triggering offense since the third offense was proven as required prior to enhancement.

**Right to counsel**

***State v. Day***, 447 S.E.2d 576 (1994) (Per Curiam)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 617) for discussion of topic.

***State v. Hopkins***, 453 S.E.2d 317 (1994) (Neely, J.)

See SENTENCING Enhancement, Prior offense without counsel, (p. 613) for discussion of topic.

**Enhancement** (continued)

**Right to counsel in prior convictions**

***State v. Day***, 447 S.E.2d 576 (1994) (Per Curiam)

Appellant was convicted on five counts of third offense shoplifting. While represented by a public defender, appellant pled guilty to second offense shoplifting. While serving a six month sentence, was taken before a magistrate and pled guilty to first offense shoplifting, this time without counsel. He was fined and returned to serve his sentence. On the current five counts, appellant was sentenced to one to ten on each, with two to run consecutively and the other three concurrently; his effective sentence was two to twenty years. He objected to the use of an uncounseled conviction to enhance his charges to third offense.

Syl. pt. 2 - "Under the sixth amendment of the federal constitution and article III, section 14 of the *West Virginia Constitution*, unless an individual convicted of a misdemeanor was represented by counsel or knowingly and intelligently waived the right to counsel, such prior conviction may not be used to enhance a sentence of imprisonment for a subsequent offense." Syllabus Point 1, *State v. Armstrong*, 175 W.Va. 381, 332 S.E.2d 837 (1985).

Syl. pt. 3 - " 'Error in the admission of testimony to which no objection was made will not be considered by this Court on appeal or writ of error, but will be treated as waived.' Syl. pt. 4, *State v. Michael*, 141 W.Va. 1, 87 S.E.2d 595 (1955)." Syllabus Point 7, *State v. Davis*, 176 W.Va. 454, 345 S.E.2d 549 (1986).

The Court noted first offense shoplifting of items less than $100.00 is a misdemeanor with a fine of not more than $50.00. (This case proceeded under the 1981 version of *W.Va. Code* § 61-3A-3, amended in 1994. See (*State v. Lewis*, 191 W.Va. 635, 447 S.E.2d 570 (1994), elsewhere this Digest). The right to counsel had previously been extended only to cases "that involve the possibility of imprisonment." *State v. Cole*, 180 W.Va. 412 at 416, 376 S.E.2d 618 at 622 (1988).

**SENTENCING**

**Enhancement** (continued)

**Right to counsel in prior convictions** (continued)

***State v. Day***, (continued)

Here, the conviction to which appellant pled without counsel was erroneously labeled first offense, when in reality it was a third offense. The record also shows that appellant admitted in his second offense plea to yet another earlier offense; the proffer here was of the second offense plea and the erroneous first offense plea, taken without counsel. Defense counsel did not object to the record of the convictions, raising only the issue of whether counsel should have been provided in the erroneous first offense plea. No error.

(**NOTE**: appellant did not challenge his conviction on constitutional grounds of proportionality of sentence. See *State v. Lewis*, 191 W.Va. 635, 447 S.E.2d 570 (1994).

***State v. Lewis***, 447 S.E.2d 570 (1994) (Workman, J.)

Appellant was convicted of shoplifting, third offense, and sentenced to one to ten years in the penitentiary, along with a fine of $500.00. She claimed the trial court erred in not accepting her plea agreement; in refusing to reduce charges to second offense because some of her prior offenses were uncounseled (appellant had been charged twice previously with third offense); and in refusing to allow alternative sentencing.

Syl. pt. 1 - "Under the sixth amendment of the federal constitution and article III, section 14 of the *West Virginia Constitution*, unless an individual convicted of a misdemeanor was represented by counsel or knowingly and intelligently waived the right to counsel, such prior conviction may not be used to enhance a sentence of imprisonment for a subsequent offense." Syl. Pt. 1, *State v. Armstrong*, 175 W.Va. 381, 332 S.E.2d 837 (1985).

Syl. pt. 2 - "Article III, Section 5 of the *West Virginia Constitution*, which contains the cruel and unusual punishment counterpart to the Eighth Amendment of the *United States Constitution*, has an express statement of the proportionality principle: 'Penalties shall be proportioned to the character and degree of the offense.'" Syl. Pt. 8, *State v. Vance*, 164 W.Va. 216, 262 S.E.2d 423 (1980).

**SENTENCING**

**Enhancement** (continued)

**Right to counsel in prior convictions** (continued)

***State v. Lewis***, (continued)

Syl. pt. 3 - "[O]ur constitution proportionality standards theoretically can apply to any criminal sentence . . . ." Syl. Pt. 4, in part, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

Syl. pt. 4 - "In determining whether a given sentence violates the proportionality principle found in Article III, Section 5 of the *West Virginia Constitution*, consideration is given to the nature of the offense, the legislative purpose behind the punishment, a comparison of the punishment with what would be inflicted in other jurisdictions, and a comparison with other offenses within the same jurisdiction." Syl. Pt. 5, *Wanstreet v. Bordenkircher*, 166 W.Va. 523, 276 S.E.2d 205 (1981).

Syl. pt. 5 - Prior to the 1994 amendments, West Virginia Code § 61-3A-3(c) (1981) was unconstitutional in that it violated the cruel and unusual proscription of the Eighth Amendment to the *United States Constitution* and Article III, Section 5 of the *West Virginia Constitution* by imposing a disproportionate sentence to the crime committed by expressly prohibiting probation and implicitly prohibiting alternative sentencing.

The Court found appellant's extensive prior criminal background made refusal of the plea agreement well within the circuit court's discretion. Specific findings were made as to appellant's lack of contriteness, manipulation of the system and two previous avoidances of the penalty for third offense shoplifting. No abuse of discretion.

As to her prior convictions being without counsel, the Court noted that appellant had counsel for each of the two prior third offense charges. *W.Va. Code* § 61-3A-3(e) requires only that two prior offenses have occurred within the preceding seven-year period; appellant pled twice to second offense. No error.

**SENTENCING**

**Enhancement** (continued)

**Right to counsel in prior convictions** (continued)

***State v. Lewis***, (continued)

The Court noted the mandatory provisions for sentencing in third offense shoplifting mirror similar provisions for third offense DUI. However, the shoplifting section expressly forbids probation, which impliedly prohibits use of alternative sentencing. The Court held the deliberate exclusion unconstitutional under proportionality principles. Only one other jurisdiction has similar provisions; the offense is nonviolent; and more serious offenses are subject to alternative sentences. Noting that the 1994 Regular Session of the Legislature amended the statute to allow for home detention, the Court found the earlier provisions unconstitutional. Reversed and remanded.

**Shoplifting**

***State v. Day***, 447 S.E.2d 576 (1994) (Per Curiam)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 617) for discussion of topic.

**Use of a firearm**

***State v. McClanahan***, 454 S.E.2d 115 (1994) (Per Curiam)

Appellant was convicted of unlawful wounding. On appeal she claimed the trial court erred in allowing enhancement of sentence pursuant to *W.Va. Code* § 62-12-2(b) upon a special interrogatory to the jury which was faxed to appellant's counsel the day before trial and filed with the circuit clerk the first day of trial.

**SENTENCING**

**Enhancement** (continued)

**Use of a firearm** (continued)

***State v. McClanahan***, (continued)

Syl. pt. 2 - "Under *W.Va. Code*, 62-12-2 (1986), the State has two options by which it may notify the defendant of its intent to seek an enhanced penalty. Under *W.Va. Code*, 62-12-2(c)(1), it may set out the charge in the indictment, or, under *W.Va. Code*, 62-12-2(c)(C), it may elect to give notice of the enhancement by a writing. In this latter event, the grounds must be set out as fully as such grounds are otherwise required to be stated in an indictment." Syllabus point 2, *State v. Johnson*, 187 W.Va. 360, 419 S.E.2d 300 (1992).

*Johnson*, *supra*, at 362, stated notice must be given soon enough that the defendant can choose to go to trial or plea bargain. The indictment here did not give fair warning of the possibility of enhancement and the jury interrogatory was received too late for meaningful opportunity to consider alternatives. Guilty verdict affirmed; enhancement reversed, with remand to reconsider sentence without use of a firearm as a factor.

***Ex post facto* application**

***State v. Wood***, 460 S.E.2d 771 (1995) (McHugh, C.J.)

Appellant was convicted of sexual assault and incest. He claimed on appeal that his sentence violated Art. III, § 4, *W.Va. Const.* and Art. I, § 10 *United States Constitution* in that the 1984 version of the sexual assault statutes carried a term of "not less than fifteen nor more than twenty-five years" while appellant was sentenced to not less than fifteen nor more than thirty-five years. *W.Va. Code* § 61-8B-3(b). Similarly, *W.Va. Code* § 61-8-12(c) relating to incest allowed for not less than five nor more than ten years, while appellant was sentenced to not less than five nor more than fifteen years.

Appellant was charged with committing these crimes in 1989; both of the enhanced penalty provisions took effect in 1991.

**SENTENCING**

***Ex post facto* application** (continued)

***State v. Wood***, (continued)

Syl. pt. 7 - " 'Under *ex post facto* principles of the *United States and West Virginia Constitutions*, a law passed after the commission of an offense which increases the punishment, lengthens the sentence or operates to the detriment of the accused, cannot be applied to him.' Syl. pt. 1, *Adkins v. Bordenkircher*, 164 W.Va. 292, 262 S.E.2d 885 (1980)." Syl. pt. 6, *State ex rel. Collins v. Bedell*, 194 W.Va. 390, 460 S.E.2d 636 (1995).

Syl. pt. 8 - "A procedural change in a criminal proceeding does not violate the *ex post facto* principles found in the *W.Va.Const.* art. III, § 4 and in the *U.S.Const.* art. I, § 10 unless the procedural change alters the definition of a crime so that what is currently punished as a crime was an innocent act when committed; deprives the accused of a defense which existed when the crime was committed; or increases the punishment for the crime after it was committed." Syl. pt. 7, *State ex rel. Collins v. Bedell*, 194 W.Va. 390, 460 S.E.2d 636 (1995).

Reversed and remanded for resentencing.

**Factual determination by jury**

***State v. Farmer***, 454 S.E.2d 378 (1994) (McHugh, J.)

See SENTENCING Kidnaping, Factual determination by judge, (p. 629) for discussion of topic.

**Firearms**

**Use of to enhance**

***State v. McClanahan***, 454 S.E.2d 115 (1994) (Per Curiam)

See SENTENCING Enhancement, Use of a firearm, (p. 620) for discussion of topic.

## SENTENCING

### Generally

***State v. Woods***, 460 S.E.2d 65 (1995) (Per Curiam)

See PROPORTIONALITY Appropriateness of sentence, Generally, (p. 539) for discussion of topic.

### Good time credit

***State ex rel. Goff v. Merrifield***, 446 S.E.2d 695 (1994) (McHugh, J.)

Petitioner was convicted of aggravated robbery and intimidation of a witness. He entered a plea agreement and on March 31, 1993 he was sentenced on aggravated robbery to a suspended sentence of ten years, probation for five years, conditioned that he serve six months in the Marion County jail. For intimidation of a witness he was sentenced to six months in the county jail and fined $25.00, the two sentences to run consecutively.

The circuit court denied petitioner's August 2, 1993 request for good time credit for complying with the jail's rules and regulations. On October 5, 1993, petitioner again requested credit on his sentence, this time for serving as a trustee. The court again refused. On this petition for writ of habeas corpus petitioner argued that his two consecutive sentences make him eligible for good time credit.

Syl. pt. 1 - *W.Va. Code*, 7-8-11 [1963] allows good time credit for county jail prisoners sentenced to jail for cumulative terms of more than six months." Syl. pt. 3, *State ex rel. Coombs v. Barnette*, 179 W.Va. 347, 368 S.E.2d 717 (1988).

Syl. pt. 2 - " 'County jail prisoners have the statutory right to good time credits and it is mandatory that they be granted their credits if they "faithfully comply with all the rules and regulations. *W.Va. Code*, 7-8-11."' Syl. Pt. 1, *State ex rel. Gillespie v. Kendrick*, 164 W.Va. 599, 265 S.E.2d 537 (1980)." Syl. pt. 1, *State ex rel. Coombs v. Barnette*, 179 W.Va. 347, 368 S.E.2d 717 (1988).

**Good time credit** (continued)

***State ex rel. Goff v. Merrifield***, (continued)

Syl. pt. 3 - " 'Good time credit is a valuable liberty interest protected by the due process clause, *W.Va. Const.* Art. III, § 10.' Syl. Pt. 2, *State ex rel. Gillespie v. Kendrick*, 164 W.Va. 599, 265 S.E.2d 537 (1980)." Syl. pt. 2, *State ex rel. Coombs v. Barnette*, 179 W.Va. 347, 368 S.E.2d 717 (1988).

Syl. pt. 4 - " 'Penal statutes must be strictly construed against the State and in favor of the defendant." Syl. Pt. 3, *State ex rel. Carson v. Wood*, 154 W.Va. 397, 175 S.E.2d 482 (1970)." Syl. pt. 4, *State ex rel. Coombs v. Barnette*, 179 W.Va. 347, 368 S.E.2d 717 (1988).

Syl. pt. 5 - "Generally the words of a statute are to be given their ordinary and familiar significance and meaning, and regard is to be had for their general and proper use." Syl. pt. 4, *State v. General Daniel Morgan Post No. 548, Veterans of Foreign Wars of the United States, a Corporation*, 144 W.Va. 137, 107 S.E.2d 353 (1959).

Syl. pt. 6 - A person who is ordered to serve a consecutive six-month period in the county jail as a condition of probation for one offense and also sentenced to serve an additional six-month period in the county jail on another offense, with the two six-month periods to be served consecutively, is eligible for good time credit pursuant to *W.Va. Code*, 7-8-11 [1986].

Syl. pt. 7 - " ' " 'A statute should be so read and applied as to make it accord with the spirit, purposes and objects of the general system of law of which it is intended to form a part; it being presumed that the legislators who drafted and passed it were familiar with all existing law, applicable to the subject matter, whether constitutional, statutory or common, and intended the statute to harmonize completely with the same and aid in the effectuation of the general purpose and design thereof, if its terms are consistent therewith." Syllabus Point 5, *State v. Snyder*, 64 W.Va. 659, 63 S.E. 385 (1908)." Syl. Pt. 1, *State ex rel. Simpkins v. Harvey*, 172 W.Va. 312, 305 S.E.2d 268 (1983).' Syl. Pt. 3, *Shell v. Bechtold*, 175 W.Va. 792, 338 S.E.2d 393 (1985)." Syl. pt. 1, *State v. White*, 188 W.Va. 534, 425 S.E.2d 210 (1992).

**SENTENCING**

**Good time credit** (continued)

***State ex rel. Goff v. Merrifield***, (continued)

Syl. pt. 8 - " ' "In ascertaining legislative intent, effect must be given to each part of the statute and to the statute as a whole so as to accomplish the general purpose of the legislation." Syl. Pt. 2, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975).' Syl. Pt. 3, *State ex rel. Fetters v. Hott*, 173 W.Va. 502, 318 S.E.2d 446 (1984)." Syl. pt. 2, *State v. White*, 188 W.Va. 534, 425 S.E.2d 210 (1992).

Syl. pt. 9 - " 'The word "shall", in the absence of language in the statute showing a contrary intent on the part of the legislature, should be afforded a mandatory connotation.' Point 2 Syllabus, *Terry v. Sencindiver*, 153 W.Va. 651[, 171 S.E.2d 480 (1969)]." Syl. pt. 3, *Bounds v. State Workmen's Compensation Comm'r*, 153 W.Va. 670, 172 S.E.2d 379 (1970).

Syl. pt. 10 - " 'When a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such case it is the duty of the courts not to construe but to apply the statute.' Syl. Pt. 1, *Cummins v. State Workmen's Compensation Comm'r*, 152 W.Va. 781, 166 S.E.2d 562 (1969)." Syl. pt. 3, *Kosegi v. Pugliese*, 185 W.Va. 384, 407 S.E.2d 388 (1991).

Syl. pt. 11 - When a person is ordered to confinement in the county jail as a condition of probation and performs work as a trustee within the jail, that person is entitled to a reduction in his sentence for work performed in the county jail according to *W.Va. Code*, 17-15-4 [1987].

Writ granted.

**Consecutive sentences**

***State ex rel. Goff v. Merrifield***, 446 S.E.2d 695 (1994) (McHugh, J.)

See SENTENCING Good time credit, (p. 623) for discussion of topic.

**SENTENCING**

**Good time credit** (continued)

**Count jail time**

***State ex rel. Goff v. Merrifield***, 446 S.E.2d 695 (1994) (McHugh, J.)

See SENTENCING Good time credit, (p. 623) for discussion of topic.

**Home confinement**

**Time in excess of maximum for probation**

***State v. Lewis***, 465 S.E.2d 384 (1995) (Recht, J.)

See PROBATION Home confinement, Time toward minimum sentence, (p. 529) for discussion of topic.

**Time toward minimum sentence**

***State v. Lewis***, 465 S.E.2d 384 (1995) (Recht, J.)

See PROBATION Home confinement, Time toward minimum sentence, (p. 529) for discussion of topic.

**Home detention**

***State v. Long***, 450 S.E.2d 806 (1994) (Miller, J.)

Appellant was convicted of second offense DUI and sentenced to six months in the county jail. She requested home confinement pursuant to *W.Va. Code* § 62-11B-1 and work release under *W.Va. Code* § 62-11A-1. The circuit court was concerned that granting both was tantamount to allowing probation or a suspended sentence, prohibited under *W.Va. Code* § 17C-5-2(m).

**SENTENCING**

**Home detention** (continued)

***State v. Long***, (continued)

Syl. pt. - *W.Va. Code*, 17C-5-2(m) (1986), provides the sentencing court with the authority to give the offender home detention, with the right under *W.Va. Code*, 62-11B-5(1)(A) (1990), to travel to and return from the offender's place of employment, for the misdemeanor convictions of first and second offenses driving under the influence of alcohol.

The Court noted that both home confinement is recognized as penal in nature, especially since violation of home confinement subjects an offender to incarceration. Home confinement is thus an alternative sentence allowable under *W.Va. Code* § 17C-5-2(m). Similarly, work release has been an established part of home detention, *W.Va. Code* § 62-11B-5(1)(A), unlike *W.Va. Code* § 62-11A-1, wherein the prisoner is released from jail to go to work. Remanded for reconsideration.

**Judicial determination of facts**

***State v. Farmer***, 454 S.E.2d 378 (1994) (McHugh, J.)

See SENTENCING Kidnaping, Factual determination by judge, (p. 629) for discussion of topic.

**Jury determination of facts**

***State v. Farmer***, 454 S.E.2d 378 (1994) (McHugh, J.)

See SENTENCING Kidnaping, Factual determination by judge, (p. 629) for discussion of topic.

## SENTENCING

### Juveniles

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See PROPORTIONALITY Appropriateness of sentence, Juveniles, (p. 540) for discussion of topic.

### Department of Corrections' authority over

***State ex rel. Hill v. Zakaib***, 461 S.E.2d 194 (1995) (Fox, J.)

See JUVENILES Probation, Eligibility for, (p. 443) for discussion of topic.

### Probation

***State ex rel. Hill v. Zakaib***, 461 S.E.2d 194 (1995) (Fox, J.)

See JUVENILES Probation, Eligibility for, (p. 443) for discussion of topic.

### Reconsideration of sentencing

***State v. Harris***, 464 S.E.2d 363 (1995) (Cleckley, J.)

See JUVENILES Sentencing, Reconsideration upon reaching majority, (p. 450) for discussion of topic.

## SENTENCING

### Kidnaping

#### Factual determination by judge

***State v. Farmer***, 454 S.E.2d 378 (1994) (McHugh, J.)

Appellant was convicted of joyriding and kidnaping with recommendation of mercy. He was sentenced to six months imprisonment for joyriding and ninety years for kidnaping, to run concurrently. Appellant went to the fast food restaurant where his estranged wife worked to discuss their marital problems. With a gun visible, he demanded that his wife and her friend get into the friend's car. He allowed the friend to get out of the car less than a block away but forced his wife to accompany him to a remote cemetery. Although conflicting, there was evidence that he threatened to kill himself and her; she was able to calm him down by agreeing to reconcile. He allowed her to escape when she asked to return her friend's car.

Appellant argued that his due process rights under Art. III, §§ 10 and 14 of the *West Virginia Constitution* were violated because the jury was not allowed to make a factual finding on whether bodily harm was inflicted or whether ransom or other concession was made for the victim's release.

Syl. pt. 1 - Pursuant to West Virginia's kidnaping statute set forth in *W.Va. Code*, 61-2-14a [1965], a trial judge, for purposes of imposing a sentence on a defendant for a term of years not less than twenty or a sentence for a term of years not less than ten, has the discretion to make findings as to whether a defendant inflicted bodily harm on a victim and as to whether ransom, money, or any other concession has been paid or yielded for the return of the victim. Because the findings by the trial judge are made solely for the purpose of determining the sentence to be imposed on a defendant and are not elements of the crime of kidnaping, *West Virginia Constitution* art. III, §§ 10 and 14, relating to a defendant's due process rights and right to a trial by jury, are not violated.

Syl. pt. 2 - "Sentences imposed by the trial court, if within statutory limits and if not based on some unpermissible factor, are not subject to appellate review." Syl. pt. 4, *State v. Goodnight*, 169 W.Va. 366, 287 S.E.2d 504 (1982).

**SENTENCING**

**Kidnapping** (continued)

**Factual determination by judge** (continued)

***State v. Farmer***, (continued)

Syl. pt. 3 - "Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction." Syl. pt. 20, ***State v. Thomas***, 157 W.Va. 640, 203 S.E.2d 445 (1974).

The Court noted due process is satisfied if the jury finds the elements of the crime have been proven. Further, the sentencing judge noted in the record appellant's previous convictions; no appellate review is proper. No error.

**Murder**

**Duty to instruct on mercy**

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

Appellant was convicted of first-degree murder without a recommendation of mercy. The trial court refused appellant's instruction explaining the consequences of a recommendation of mercy. The instruction said "eligibility for parole in no way guarantees immediate parole after ten years. Parole is given to inmates only after a thorough consideration of their records by the Parole Board." The court allowed the prosecution's instruction that first-degree murder "with recommendation of mercy is punishable by confinement in the penitentiary of this state for life with eligibility for parole after ten years."

**SENTENCING**

**Murder** (continued)

**Duty to instruct on mercy** (continued)

***State v. Jenkins***, (continued)

Syl. pt. 10 - " 'In a case in which a jury may return a verdict of guilty of murder of the first-degree, it is the mandatory duty of the trial court, without request, to instruct the jury that to such verdict it may add a recommendation of mercy, that such recommendation would mean that the defendant could be eligible for parole consideration only after having served a minimum of ten years and that otherwise the defendant would be confined to the penitentiary for life without possibility of parole.' Syl. pt. 3, *State v. Lindsey*, 160 W.Va. 284, 233 S.E.2d 734 (1977)." Syllabus Point 4, *State v. Headley*, 168 W.Va. 138, 282 S.E.2d 872 (1981).

Reversed and remanded.

**Options**

**Improper to mention**

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 544) for discussion of topic.

**Plea agreement**

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See PROPORTIONALITY Appropriateness of sentence, Juveniles, (p. 540) for discussion of topic.

## SENTENCING

### Probation

#### Condition of

***State v. Watters***, 447 S.E.2d 14 (1994) (Per Curiam)

Appellant pled nolo contendere to third-degree sexual assault. He was sentenced to twelve months in jail and fined $500.00. The circuit court then suspended six months of the sentence and imposed thirty-six months of probation. Appellant contended the jail time exceeded the statutory one-third of the minimum sentence for probationers as required in *W.Va. Code* § 62-12-9. The minimum sentence for third-degree sexual assault is six months, *W.Va. Code* § 61-11-8; one-third would be two months jail time.

Syl. pt. - "In sentencing an offender, a court may either sentence the individual to a period of incarceration or place the individual on probation. If the court wishes to probate with a period of incarceration as a condition of that probation, *West Virginia Code* § 62-12-9(4) (1991) must be followed." Syl. Pt. 3, *State v. White*, 188 W.Va. 534, 425 S.E.2d 210 (1992).

***State v. Watters***, 447 S.E.2d 14 (1994) (Per Curiam)

The jail time here was not designated a "condition" of probation, as in *White*, *supra*. The intent here appeared to be both incarceration *and* probation. The Court noted an individual can be sentenced to jail time or put on probation, not both. If the incarceration was not a condition of probation it was void. Reversed and remanded with directions.

#### Incarceration as condition of

***State v. Watters***, 447 S.E.2d 14 (1994) (Per Curiam)

See SENTENCING Probation, Condition of, (p. 632) for discussion of topic.

## SENTENCING

### Proportionality

#### Alternative sentencing

***State v. Lewis***, 447 S.E.2d 570 (1994) (Workman, J.)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 618) for discussion of topic.

#### Generally

***State v. Farr***, 456 S.E.2d 199 (1995) (Per Curiam)

See PROPORTIONALITY Appropriateness of sentence, Generally, (p. 539) for discussion of topic.

***State v. Wyne***, 460 S.E.2d 450 (1995) (Miller, J.)

See SENTENCING Enhancement, Proof of triggering offense, (p. 615) for discussion of topic.

#### Juveniles

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See PROPORTIONALITY Appropriateness of sentence, Juveniles, (p. 540) for discussion of topic.

### Recidivism

***State v. Lewis***, 447 S.E.2d 570 (1994) (Workman, J.)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 618) for discussion of topic.

**SENTENCING**

**Recidivism** (continued)

***State v. Wyne***, 460 S.E.2d 450 (1995) (Miller, J.)

See SENTENCING Enhancement, Proof of triggering offense, (p. 615) for discussion of topic.

**Review of limited record**

***State v. Eddie "Tosh" K.***, 460 S.E.2d 489 (1995) (Per Curiam)

See JUVENILES First offenders, Judge's overreaction to, (p. 438) for discussion of topic.

**Standard for review**

***Ronnie R. v. Trent***, 460 S.E.2d 499 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 367) for discussion of topic.

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

See SENTENCING Appeal of, Standard for review, (p. 611) for discussion of topic.

**Statutory limits**

***Ronnie R. v. Trent***, 460 S.E.2d 499 (1995) (Per Curiam)

See INEFFECTIVE ASSISTANCE Standard for determining, (p. 367) for discussion of topic.

**SENTENCING**

**Voidable when technically infirm**

***State ex rel. Hill v. Zakaib***, 461 S.E.2d 194 (1995) (Fox, J.)

See JUVENILES Probation, Eligibility for, (p. 443) for discussion of topic.

**SEQUESTRATION**

**Order violated**

**Effect of**

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See WITNESSES Sequestration, Violation of, (p. 714) for discussion of topic.

## SERVICE OF PROCESS

### Qualifications to serve

***State ex rel. Wolfe v. King***, 443 S.E.2d 823 (1994) (Brotherton, C.J.)

Petitioner requested writ of prohibition to prevent respondent from prohibiting him from serving process. The judge, sua sponte, issued an order deeming service to be inadequate pursuant to Rule 4(c) and *W.Va. Code* § 56-3-11 if served by a convicted felon. Petitioner is a convicted felon who has paid all fines in full and served his sentence. The primary issue is whether a convicted felon can be a "credible person" pursuant to *W.Va. Code* § 56-3-11.

Syl. pt. 1 - "[A] person, in order to be competent to serve and return such process, must be a credible person." Syllabus pt. 1, in part, *Peck v. Chambers*, 44 W.Va. 270, 28 S.E. 706 (1897).

Syl. pt. 2 - A convicted felon who has completed the punishment and paid all fines set by judgment of the court is considered to be a credible person for the purpose of service of process pursuant to Rule 4(c) of the *West Virginia Rules of Civil Procedure*.

The Court noted *Richardson v. Ramiriez*, 418 U.S. 24, 94 S.Ct. 2655, 41 L.Ed.2d 551 (1974) upheld California's denial of the right to vote to ex-convicts. Here, however, no prohibition exists denying ex-convicts the right to serve process. West Virginia allows convicts to testify in court. *W.Va. Code* § 57-3-5. Further, the prohibition against voting is removed after completion of the punishment. *Osborne v. Kanawha County Court*, 68 W.Va. 189, 69 S.E. 470 (1910); and he can testify at trial, the primary reason for requiring service by a credible person. Writ granted.

## SEXUAL ATTACKS

### Assault

#### Sufficiency of evidence

***State v. Hottinger***, 461 S.E.2d 462 (1995) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Sexual assault, Forcible compulsion, (p. 671) for discussion of topic.

### Child assault or abuse

#### Collateral crimes

***State v. Malick***, 457 S.E.2d 482 (1995) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 215) for discussion of topic.

#### Expert psychological testimony

***State v. Wood***, 460 S.E.2d 771 (1995) (McHugh, C.J.)

See EVIDENCE Admissibility, Expert opinion, (p. 224) for discussion of topic.

#### Joinder of charges

***State v. D.E.G. Sr.***, 460 S.E.2d 657 (1995) (Per Curiam)

See INDICTMENT Joinder of offenses, (p. 355) for discussion of topic.

## SEXUAL ATTACKS

**Child assault or abuse** (continued)

**Psychological evaluation of victim**

***State v. Malick***, 457 S.E.2d 482 (1995) (Per Curiam)

See PSYCHOLOGICAL/PSYCHIATRIC EVALUATION Denial of, (p. 558) for discussion of topic.

**Collateral crimes**

**Other than accused**

***State v. Malick***, 457 S.E.2d 482 (1995) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 215) for discussion of topic.

**Other than victim**

***State v. Malick***, 457 S.E.2d 482 (1995) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 215) for discussion of topic.

**Evidence**

**Collateral crimes**

***State v. Malick***, 457 S.E.2d 482 (1995) (Per Curiam)

See EVIDENCE Admissibility, Collateral crimes, (p. 215) for discussion of topic.

**SEXUAL ATTACKS**

**Evidence** (continued)

**Psychological evaluation of victim**

***State v. Malick***, 457 S.E.2d 482 (1995) (Per Curiam)

See PSYCHOLOGICAL/PSYCHIATRIC EVALUATION Denial of, (p. 558) for discussion of topic.

**Indictments of**

**Joinder of charges**

***State v. D.E.G. Sr.***, 460 S.E.2d 657 (1995) (Per Curiam)

See INDICTMENT Joinder of offenses, (p. 355) for discussion of topic.

**Joinder of charges**

***State v. D.E.G. Sr.***, 460 S.E.2d 657 (1995) (Per Curiam)

See INDICTMENT Joinder of offenses, (p. 355) for discussion of topic.

**Lesser included offenses**

**Fornication as lesser of assault**

***State v. Hottinger***, 461 S.E.2d 462 (1995) (Per Curiam)

Appellant was convicted of sexual assault in the second and third degrees. He claimed the jury should have been instructed on the elements of fornication as a lesser included offense.

## SEXUAL ATTACKS

**Lesser included offenses** (continued)

**Fornication as lesser of assault** (continued)

***State v. Hottinger***, (continued)

Syl. pt. 5 - " 'The test of determining whether a particular offense is a lesser included offense is that the lesser offense must be such that it is impossible to commit the greater offense without first having committed the lesser offense. An offense is not a lesser included offense if it requires the inclusion of an element not required in the greater offense.' Syllabus Point 1, *State v. Louk*, 169 W.Va. 24, 285 S.E.2d 432 (1981)." Syl. pt. 1, *State v. Neider*, 170 W.Va. 662, 295 S.E.2d 902 (1982).

The Court noted fornication is not defined by *W.Va. Code* § 61-8-3, the section making it a crime. However, based on the general definition that it is merely sexual relations between unmarried persons, it clearly lacks the element of forcible compulsion (second-degree sexual assault) and the element of a victim less than sixteen years old (third degree sexual assault). No error.

**Plea bargains**

***State v. D.E.G. Sr.***, 460 S.E.2d 657 (1995) (Per Curiam)

See INDICTMENT Joinder of offenses, (p. 355) for discussion of topic.

**Sexual abuse**

**Failure to specify dates**

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

See INDICTMENT Sufficiency of, Sexual assault, (p. 359) for discussion of topic.

## SEXUAL ATTACKS

### Sexual abuse profile

***State v. Wood***, 460 S.E.2d 771 (1995) (McHugh, C.J.)

See EVIDENCE Admissibility, Expert opinion, (p. 224) for discussion of topic.

### Sexual assault

#### Elements of crime

***State ex rel. Morgan v. Trent***, 465 S.E.2d 257 (1995) (Miller, J.)
(consolidated) ***Dean v. Duncil***, 465 S.E.2d 257 (1995) (Miller, J.)

See SEXUAL ATTACKS Sexual assault, Victim's age, (p. 643) for discussion of topic.

#### Sufficiency of evidence

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

Appellant was convicted of second-degree sexual assault. The victim testified that appellant had sex with her twice when she was thirteen years old, apparently under coercion by a third party who threatened the victim into complying. The indictment failed to specify exact dates. Upon defense counsel's motion to force election of counts on which to proceed, the prosecution said both incidents probably occurred in 1990. Appellant claimed that he was not responsible for any fear, coercion or intimidation and was therefore not guilty.

Syl. pt. 1 - "The function of an appellate court when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, is sufficient to convince a reasonable person of the defendant's guilt beyond a reasonable doubt. Thus, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rationale trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt." Syllabus Point 1, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

## SEXUAL ATTACKS

**Sexual assault** (continued)

**Sufficiency of evidence** (continued)

***State v. Miller***, (continued)

Syl. pt. 2 - "A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all of the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior cases are inconsistent, they are expressly overruled." Syllabus Point 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995).

The Court declined to rule on whether the necessary compulsion must come from the defendant. The jury could have found that the appellant had intercourse with the victim and that he knew another was forcing her. No error.

**Victim's age**

***State ex rel. Morgan v. Trent***, 465 S.E.2d 257 (1995) (Miller, J.) (consolidated) ***Dean v. Duncil***, 465 S.E.2d 257 (1995) (Miller, J.)

Relators were convicted of first-degree sexual assault, involving an assailant who is more than 14 and a victim who is eleven or less. *W.Va. Code* § 61-8B-3. It was stipulated that the Morgan victim was eleven years and eight months at the time of the assault.

***State ex rel. Morgan v. Trent***, (continued)
(consolidated) ***Dean v. Duncil***, (continued)

The state argued that the common meaning of being eleven includes any additional months until one reaches twelve. It was agreed that this proof of age issue was not raised at either trial. Relators claimed it was at issue here because failure to prove each element of the crime is an unconstitutional denial of due process. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Jenkins*, 191 W.Va. 87, 443 S.E.2d 244 (1994). (The Court specifically refused to treat as a waiver Morgan's acknowledgment that he had raised all issues to be raised in his earlier habeas corpus petition.)

Syl. pt. 1 - " 'In a criminal prosecution, the State is required to prove beyond a reasonable doubt every material element of the crime with which the defendant is charged....' Syllabus Point 4, *State v. Pendry*, 159 W.Va. 738, 227 S.E.2d 210 (1976)[.]" Syllabus Point 7, *in part*, *State v. Jenkins*, 191 W.Va. 87, 443 S.E.2d 244 (1994).

Syl. pt. 2 - "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syllabus Point 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 3 - "Under the 'plain error' doctrine, 'waiver' of error must be distinguished from 'forfeiture' of a right. A deviation from a rule of law is error unless there is a waiver. When there has been a knowing and intentional relinquishment or abandonment of a known right, there is no error and the inquiry as to the effect of a deviation from the rule of law need not be determined. By contrast, mere forfeiture of a right--the failure to make timely assertion of the right--does not extinguish the error. In such a circumstance, it is necessary to continue the inquiry and to determine whether the error is 'plain.' To be 'plain,' the error must be 'clear' or 'obvious.'" Syllabus Point 8, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

**SEXUAL ATTACKS**

**Sexual assault** (continued)

**Victim's age** (continued)

***State ex rel. Morgan v. Trent***, (continued)
(consolidated) ***Dean v. Duncil***, (continued)

Syl. pt. 4 - "Assuming that an error is 'plain,' the inquiry must proceed to its last step and a determination made as to whether it affects the substantial rights of the defendant. To affect substantial rights means the error was prejudicial. It must have affected the outcome of the proceedings in the circuit court, and the defendant rather than the prosecutor bears the burden of persuasion with respect to prejudice." Syllabus Point 9, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

Syl. pt. 5 - In construing an ambiguous criminal statute, the rule of lenity applies which requires that penal statutes must be strictly construed against the State in favor of the defendant.

Syl. pt. 6 - " 'A criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication.' Syl. pt. 1, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974)." Syllabus Point 1, *State v. Blair*, 190 W.Va. 425, 438 S.E.2d 605 (1993).

Syl. pt. 7 - " 'Criminal statutes, which do not impinge upon First Amendment freedoms or other similarly sensitive constitutional rights, are tested for certainty and definiteness by construing the statute in light of the conduct to which it is applied.' Syl. pt. 3, *State v. Flinn*, 158 W.Va. 111, 208 S.E.2d 538 (1974)." Syllabus Point 3, *State v. Blair*, 190 W.Va. 425, 438 S.E.2d 605 (1993).

Syl. pt. 8 - The language of *W.Va. Code*, 61-8B-3(a)(2) (1991), that identifies the victim of sexual assault in the first-degree as a person "who is eleven years old or less" applies to a person who is eleven years old, but who has not reached his or her twelfth birthday.

## SEXUAL ATTACKS

### Sexual assault (continued)

#### Victim's age (continued)

***State ex rel. Morgan v. Trent***, (continued)
(consolidated) ***Dean v. Duncil***, (continued)

The Court accepted the issue here even though it was not raised below. Further, the Court noted the rule of lenity does not prevent it from looking behind the statute to determine its object and underlying policy. The 1984 revisions to this section changed the definition of victim from a person less than eleven years to "eleven years old or less." The policy was obviously to broaden the class of victims. It would make no sense to interpret the statute to mean only the day one turns eleven was thereby added, not the intervening time until one turns twelve. The victims here were within the statute. Writ denied (appeal affirmed.)

#### Sufficiency of evidence

***State ex rel. Morgan v. Trent***, 465 S.E.2d 257 (1995) (Miller, J.)
(consolidated) ***Dean v. Duncil***, 465 S.E.2d 257 (1995) (Miller, J.)

See SEXUAL ATTACKS Sexual assault, Victim's age, (p. 643) for discussion of topic.

#### Forcible compulsion

***State v. Hottinger***, 461 S.E.2d 462 (1995) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Sexual assault, Forcible compulsion, (p. 671) for discussion of topic.

## SHOPLIFTING

### Third offense

#### Home confinement as sentence

***State v. Lewis***, 465 S.E.2d 384 (1995) (Recht, J.)

See PROBATION Home confinement, Time toward minimum sentence, (p. 529) for discussion of topic.

## SIXTH AMENDMENT

### Abuse and neglect

***In the Matter of Lindsey C.***, 473 S.E.2d 110 (1995) (Albright, J.)

See TERMINATION OF PARENTAL RIGHTS Guardian required, (p. 678) for discussion of topic.

### Enhancement of sentence

***State v. Day***, 447 S.E.2d 576 (1994) (Per Curiam)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 617) for discussion of topic.

***State v. Lewis***, 447 S.E.2d 570 (1994) (Workman, J.)

See SENTENCING Enhancement, Right to counsel in prior convictions, (p. 618) for discussion of topic.

### Prior uncounseled convictions

***State v. Hopkins***, 453 S.E.2d 317 (1994) (Neely, J.)

See SENTENCING Enhancement, Prior offense without counsel, (p. 613) for discussion of topic.

### Judge-jury communication

#### Right to counsel during

***State v. Allen***, 455 S.E.2d 541 (1994) (Cleckley, J.)

See RIGHT TO BE PRESENT All stages of proceedings, (p. 564) for discussion of topic.

## SIXTH AMENDMENT

### Right to confront

#### Admissibility of extrajudicial statements

***State v. Dillon***, 447 S.E.2d 583 (1994) (Workman, J.)

See EVIDENCE Admissibility, Tape recorded statements to informant, (p. 255, 256, 257, 258, 259) for discussion of topic.

***State v. Mason***, 460 S.E.2d 36 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Extrajudicial statements, (p. 226) for discussion of topic.

***State v. Osakalumi***, 461 S.E.2d 504 (McHugh, C.J.)

See EVIDENCE Admissibility, Extrajudicial statements, (p. 230) for discussion of topic.

### Right to counsel

#### Admissibility of extrajudicial statements

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

Appellant was convicted of sexual assault. At trial, the deposition of a key medical witness was introduced into evidence. The doctor had examined the vaginal swab taken shortly after the alleged assault and confirmed the presence of sperm. On appeal, appellant contended his right to confront was abridged and that the prosecution did not show the witness was unavailable.

The witness was originally scheduled to testify but the trial was postponed on appellant's motion. Appellant's trial attorney was present at the deposition and cross-examined the witness. The witness was on vacation on the second trial date; appellant claimed the requirements of Rule 804(a) of the *Rules of Evidence* were not met.

**SIXTH AMENDMENT**

**Right to counsel** (continued)

**Admissibility of extrajudicial statements** (continued)

***State ex rel. Azeez v. Mangum***, (continued)

Syl. pt. 7 - "The two central requirements for admission of extrajudicial testimony under the Confrontation Clause contained in the Sixth Amendment to the *United States Constitution* are: (1) demonstrating the unavailability of the witness to testify; and (2) proving the reliability of the witness's out-of-court statement." Syllabus Point 2, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

Syl. pt. 8 - "In order to satisfy its burden of showing that the witness is unavailable, the State must prove that is has made a good-faith effort to obtain the witness's attendance at trial. This showing necessarily requires substantial diligence." Syllabus Point 3, *State v. James Edward S.*, 184 W.Va. 408, 400 S.E.2d 843 (1990).

No error.

**Municipal offenses**

***State ex rel. Kees v. Sanders***, 453 S.E.2d 436 (1994) (McHugh, J.)

See APPOINTED COUNSEL Municipal offenses, (p. 44) for discussion of topic.

**Spousal testimony to grand jury**

***State v. Jarrell***, 442 S.E.2d 223 (1994) (Brotherton, J.)

See RIGHT TO CONFRONT Spousal testimony to grand jury, (p. 569) for discussion of topic.

## SIXTH AMENDMENT

### Right to impartial jury

#### Bailiff as witness

***State v. Kelley***, 451 S.E.2d 425 (1994) (McHugh, J.)

See WITNESSES Bailiff as witness, (p. 707) for discussion of topic.

### Termination of parental rights

***In the Matter of Lindsey C.***, 473 S.E.2d 110 (1995) (Albright, J.)

See TERMINATION OF PARENTAL RIGHTS Guardian required, (p. 678) for discussion of topic.

## SPEEDY TRIAL

### Three term rule

***State ex rel. Waldron v. Stephens***, 457 S.E.2d 117 (1995) (Per Curiam)

See RIGHT TO SPEEDY TRIAL Standard for determining, (p. 575) for discussion of topic.

## SPOUSAL IMMUNITY

### Defined

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Marital communications, (p. 239) for discussion of topic.

### Limits of

***State v. Bradshaw***, 457 S.E.2d 456 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Marital communications, (p. 239) for discussion of topic.

**SPOUSAL PRIVILEGE**

**Limits of**

***State v. Malick***, 457 S.E.2d 482 (1995) (Per Curiam)

See IMMUNITY Spousal testimony, (p. 350) for discussion of topic.

**Offense against child**

***State v. Malick***, 457 S.E.2d 482 (1995) (Per Curiam)

See IMMUNITY Spousal testimony, (p. 350) for discussion of topic.

## STANDING

### Paternity

#### Grandparents

***State ex rel. David Allen B. v. Sommerville***, 459 S.E.2d 363 (1995) (Recht, J.)

See PATERNITY Blood tests, When required, (p. 495) for discussion of topic.

## STATUTES

### Kidnaping

***State v. Farmer***, 445 S.E.2d 759 (1994) (Per Curiam)

See KIDNAPING Incidental to another offense, (p. 452) for discussion of topic.

### Legislative intent

***State ex rel. Estes v. Egnor***, 443 S.E.2d 193 (1994) (Miller, J.)

See JUVENILES School attendance, Responsibility of parent or guardian, (p. 446) for discussion of topic.

***State ex rel. Goff v. Merrifield***, 446 S.E.2d 695 (1994) (McHugh, J.)

See SENTENCING Good time credit, (p. 623) for discussion of topic.

***State v. Lewis***, 465 S.E.2d 384 (1995) (Recht, J.)

See PROBATION Home confinement, Time toward minimum sentence, (p. 529) for discussion of topic.

### License to carry weapons

#### Constitutionality

***In re Application of Luzader***, No. 22850 (12/8/95) (Per Curiam)

See DEADLY WEAPON License to carry, Restrictions on, (p. 169) for discussion of topic.

## STATUTES

### Notice of crime

***State ex rel. Morgan v. Trent***, 465 S.E.2d 257 (1995) (Miller, J.)
(consolidated) ***Dean v. Duncil***, 465 S.E.2d 257 (1995) (Miller, J.)

See SEXUAL ATTACKS Sexual assault, Victim's age, (p. 643) for discussion of topic.

### Plain language

***State ex rel Goff v. Merrifield***, 446 S.E.2d 695 (1994) (McHugh, J.)

See SENTENCING Good time credit, (p. 623) for discussion of topic.

### Presumption of constitutionality

***State ex rel. Collins v. Bedell***, 460 S.E.2d 636 (1995) (McHugh, C.J.)
(consolidated) ***State ex rel. Peeples v. Knight***, 460 S.E.2d 636 (1995) (McHugh, C.J.)

See MAGISTRATE COURT Appeal from, (p. 454) for discussion of topic.

### Statutes of limitations

#### Misdemeanors

***State v. Linkous***, 460 S.E.2d 288 (1995) (Per Curiam)

Appellant was convicted of negligent homicide. The vehicular accident causing death occurred 16 November 1991; the indictment was returned 16 November 1992. Appellant claimed his prosecution was barred by the one-year statute of limitations for misdemeanors. See *W.Va. Code*, 61-11-9.

Syl. pt. 1 - "Our statute--Code, chap. 13, sec. 12--which declares that, "The time within which an act is to be done shall be computed by excluding the first day and including the last; or, if the last be Sunday, it shall also be excluded,' applies to the construction of statutes in criminal as well as civil cases. (p. 779.)" Syllabus Point 2, *State v. Beasley*, 21 W.Va. 777 (1883).

**STATUTES**

**Statutes of limitations** (continued)

**Misdemeanors** (continued)

***State v. Linkous***, (continued)

By this rule, appellant's indictment was timely. See also, *W.Va. Code* § 2-2-3; *Lamb Trustee v. Ceicle*, 28 W.Va. 653 (1886); *Steeley v. Funkhouser*, 153 W.Va. 423, 169 S.E.2d 701 (1969).

**Statutory construction**

***State ex rel. Morgan v. Trent***, 465 S.E.2d 257 (1995) (Miller, J.) (consolidated) ***Dean v. Duncil***, 465 S.E.2d 257 (1995) (Miller, J.)

See SEXUAL ATTACKS Sexual assault, Victim's age, (p. 643) for discussion of topic.

**Generally**

***State ex rel. S.C. v. Chafin***, 444 S.E.2d 62 (1994) (McHugh, J.)

See CHILD CUSTODY Case plan for child, (p. 135) for discussion of topic.

**Pari materia not applicable**

***Chrystal R.M. v. Charlie A.L.***, 459 S.E.2d 415 (1995) (Miller, J.)

See PATERNITY Acknowledgment of in adoption, (p. 491) for discussion of topic.

## STATUTES OF LIMITATION

### Method for calculating time

***State v. Linkous***, 460 S.E.2d 288 (1995) (Per Curiam)

See STATUTES Statutes of limitations, Misdemeanors, (p. 657) for discussion of topic.

## SUBPOENAS

### Attorney-client privilege

#### When effective against

***State ex rel. Doe v. Troisi***, 459 S.E.2d 139 (1995) (Cleckley, J.)

Respondent judge was appointed special judge for Kanawha County. He appointed a special prosecuting attorney to pursue charges against two unnamed suspects before a special grand jury. One of the suspects was accused of sexually harassing court employees prior to his resignation as circuit judge. The other, an alleged victim of the sexual harassment, attempted to extort money from the former judge and was herself indicted on federal charges.

Following dismissal of the federal charges, she issued a copy of an affidavit given in the federal investigation, along with a press release. Grand jury subpoenas were issued for her lawyer, an associate in the firm and an investigator employed by the firm. Respondent refused to quash the subpoenas. The lawyers, relators here, sought to broaden the scope of attorney-client privilege so as to require a compelling need for information to justify enforcement of the subpoenas.

Syl. pt. 1 - " 'In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.' Syllabus Point 1, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979)." Syllabus Point 12, *Glover v. Narick*, 184 W.Va. 381, 400 S.E.2d 816 (1990).

Syl. pt. 2 - In situations where the refusal of a motion to quash a subpoena based on the attorney-client privilege could result in imminent and irreparable harm, petitioning for a writ of prohibition is the appropriate method of challenging the subpoena.

**SUBPOENAS**

**Attorney-client privilege** (continued)

**When effective against** (continued)

***State ex rel. Doe v. Troisi***, (continued)

Syl. pt. 3 - As a general rule, the attorney-client privilege is adequate protection of client confidences even in the context of a grand jury proceeding. There is no need to quash a grand jury subpoena simply because it is issued to an attorney of an individual under investigation. Once properly invoked, the circuit court has discretion to decide on a question-by-question basis whether the privilege was properly asserted during the grand jury proceedings.

Syl. pt. 4 - If it is apparent that a subpoena was issued for improper reasons, a circuit court has the discretion and inherent authority to require a prosecutor to make a preliminary showing of relevance and inability to obtain the disputed material from another source.

Although normally an interlocutory order, the Court agreed to hear the issue of the court's refusal to quash the grand jury subpoena. Here, counsel would be placed in an ethical dilemma by the subpoenas if the attorney-client privilege were really infringed.

The Court noted the historical reasons for both grand jury freedoms of investigation and the policy of encouraging free communication protected by the attorney-client privilege. While acknowledging the need for protection of the privilege the Court refused to adopt a per se rule freeing counsel from grand jury testimony. A trial court must be free to balance the competing interests by ruling whenever the privilege is asserted. Writ denied.

## SUFFICIENCY OF EVIDENCE

### Aiding and abetting

***State v. Mayo***, 443 S.E.2d 236 (1994) (Miller, J.)

See AIDING AND ABETTING Witnessing crime, (p. 22) for discussion of topic.

### Attempted murder

***State v. Kirkland***, 447 S.E.2d 278 (1994) (Workman, J.)

See SUFFICIENCY OF EVIDENCE Generally, (p. 663) for discussion of topic.

### Circumstantial evidence

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See APPEAL Sufficiency of evidence, Generally, (p. 39) for discussion of topic.

### Driving under the influence

***Boley v. Cline***, 456 S.E.2d 38 (1995) (Per Curiam)

See DRIVING UNDER THE INFLUENCE Blood alcohol tests, No right to, (p. 188) for discussion of topic.

### Generally

***State ex rel. Morgan v. Trent***, 465 S.E.2d 257 (1995) (Miller, J.)
(consolidated) ***Dean v. Duncil***, 465 S.E.2d 257 (1995) (Miller, J.)

See SEXUAL ATTACKS Sexual assault, Victim's age, (p. 643) for discussion of topic.

**Generally** (continued)

***State v. Deem***, 456 S.E.2d 22 (1995) (Per Curiam)

See SUFFICIENCY OF EVIDENCE Presence at crime scene, Effect of, (p. 669) for discussion of topic.

***State v. Eddie "Tosh" K.***, 460 S.E.2d 489 (1995) (Per Curiam)

See JUVENILES First offenders, Judge's overreaction to, (p. 438) for discussion of topic.

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See APPEAL Sufficiency of evidence, Generally, (p. 39) for discussion of topic.

***State v. Kirkland***, 447 S.E.2d 278 (1994) (Workman, J.)

Appellant was convicted of second-degree murder, malicious assault and attempted murder. Brian Berry, appellant's stepson, went to a tire store; he proceeded to have a heated argument with the store owner, Dickie Rhodes, over an overdue bill. Berry left the store, telling Rhodes he was going for the money.

Berry went to his girlfriend's apartment where his stepfather also happened to be; as they were leaving, one resident testified that Berry told a neighbor to come with them and "to go back and get his piece." The neighbor joined appellant and Berry in appellant's car.

**Generally** (continued)

***State v. Kirkland***, (continued)

The tire owner's son testified that he noticed the neighbor coming out of his apartment with a gun and enter appellant's car. The son returned to the store to warn his father. When appellant and the others arrived, the owner met them with a baseball bat and "told them the best thing they could do is shut their damn mouths and get back in the car because he didn't want no trouble." Berry and the neighbor returned to the car while appellant and the owner entered the store to discuss the bill. Appellant apparently acted peacefully while inside.

Upon returning to the car the owner and Berry got into an argument. Berry apparently yelled "I ain't going to pay you, you white son of a bitch," whereupon the owner reached into the car and struck him. Berry pulled a 9mm pistol and shot the owner, fatally wounding him. The pistol was shown to have been owned by his girlfriend; she testified that she had left it in the car previously.

Appellant drove away, with the owner's son in pursuit. The son rammed the car and several shots were fired by Berry; one bullet was eventually recovered from the son's truck.

At trial appellant's voluntary exculpatory statement was admitted, in which he described his talk with the owner and denied shooting anyone or having knowledge of Berry's gun. Berry's voluntary statement admitted shooting the owner because he felt his life was threatened. Appellant testified at trial that he did not know Berry's friend had a gun, nor did Berry tell him that the owner had shoved him during the first argument. Appellant claimed on appeal that the evidence was insufficient.

Syl. pt. 1 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done.' Syl. Pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978)." Syl. Pt. 7, *State v. Knotts*, 187 W.Va. 795, 421 S.E.2d 917 (1992).

***State v. Kirkland***, (continued)

Syl. pt. 2 - "Where a defendant is convicted of a particular substantive offense, the test of the sufficiency of the evidence to support the conviction necessarily involves consideration of the traditional distinction between parties to offenses. Thus, a person may be convicted of a crime so long as the evidence demonstrates that he acted as an accessory before the fact, as a principal in the second-degree, or as a principal in the first-degree in the commission of such offense." Syl. Pt. 8, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).

Syl. pt. 3 - " ' "Merely witnessing a crime, without intervention, does not make a person a party to its commission unless his interference was a duty, and his non-interference was one of the conditions of the commission of the crime; or unless his non-interference was designed by him and operated as an encouragement to or protection of the perpetrator." Syllabus, *State v. Patterson*, 109 W.Va. 588, 155 S.E. 661 [1930].' Syllabus Point 3, *State v. Haines*, 156 W.Va. 281, 192 S.E.2d 879 (1972)." Syl. Pt. 9, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).

Syl. pt. 4 - "Proof that the defendant was present at the time and place the crime was committed is a factor to be considered by the jury in determining guilt, along with other circumstances, such as the defendant's association with or relation to the perpetrator and his conduct before and after the commission of the crime." Syl. Pt. 10, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).

Syl. pt. 5 - "The Double Jeopardy Clause of the Federal and this State's Constitutions forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding." Syl. Pt. 4, *State v. Frazier*, 162 W.Va. 602, 252 S.E.2d 39 (1979).

**Generally** (continued)

***State v. Kirkland***, (continued)

The Court found no evidence that appellant willingly participated in the crimes with the perpetrator. Similarly, there was no evidence appellant went to the store after devising a plan to get revenge on the deceased. Further, the state failed to establish appellant had the same criminal intent as the principal in the first-degree; or that appellant encouraged, or even knew of, Berry's intent to shoot the deceased. Even viewing the evidence in the light most favorable to the prosecution, the evidence was insufficient. *State v. Mayo*, 191 W.Va. 79, 443 S.E.2d 236 (1994). Double jeopardy forbids retrial. Syl. Pt. 4, *State v. Frazier*, 162 W.Va. 602, 252 S.E.2d 39 (1979). Reversed (in part, also affirmed in part; see elsewhere, this Digest).

***State v. Mayo***, 443 S.E.2d 236 (1994) (Miller, J.)

See AIDING AND ABETTING Witnessing crime, (p. 22) for discussion of topic.

***State v. Mullins***, 456 S.E.2d 42 (1995) (Fox, J.)

See AIDING AND ABETTING Principal in first and second-degree defined, (p. 20) for discussion of topic.

***State v. Walls***, 445 S.E.2d 515 (1994) (Per Curiam)

See INSANITY Presumptions, (p. 377) for discussion of topic.

**Homicide**

***State v. Jenkins***, 443 S.E.2d 244 (1994) (Miller, J.)

See HOMICIDE Sufficiency of evidence, (p. 342) for discussion of topic.

**SUFFICIENCY OF EVIDENCE**

**Homicide** (continued)

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

See HOMICIDE Sufficiency of evidence, (p. 344) for discussion of topic.

**Corpus delicti**

*State v. Garrett*, 466 S.E.2d 481 (1995) (McHugh, C.J.)

See HOMICIDE Corpus delicti, Proof of, (p. 333) for discussion of topic.

**Malicious assault**

***State v. Kirkland***, 447 S.E.2d 278 (1994) (Workman, J.)

See SUFFICIENCY OF EVIDENCE Generally, (p. 663) for discussion of topic.

**Murder**

***State v. Justice***, 445 S.E.2d 202 (1994) (Per Curiam)

See HOMICIDE Sufficiency of evidence, (p. 344) for discussion of topic.

**First-degree**

***State v. Guthrie***, 461 S.E.2d 163 (1995) (Cleckley, J.)

See APPEAL Sufficiency of evidence, Generally, (p. 39) for discussion of topic.

## SUFFICIENCY OF EVIDENCE

**Murder** (continued)

**Second-degree**

***State v. Kirkland***, 447 S.E.2d 278 (1994) (Workman, J.)

See SUFFICIENCY OF EVIDENCE Generally, (p. 663) for discussion of topic.

**Negligent homicide**

***State v. Linkous***, 460 S.E.2d 288 (1995) (Per Curiam)

Appellant was convicted of negligent homicide. He claimed the prosecution failed to prove the elements of negligent homicide beyond a reasonable doubt, specifically, negligence "so gross, wanton and culpable as to show a reckless disregard of human life."

Syl. pt. 4 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Here, the state presented an accident reconstruction expert who testified that appellant's truck crossed the center line. Other witnesses testified they saw the truck "spinning out, carrying on, slid sideways and went on down towards town," and that "a Ford truck come through town at a high rate of speed.....and hit another truck." Evidence sufficient. No error.

## SUFFICIENCY OF EVIDENCE

### New trial

***State v. Crouch***, 445 S.E.2d 213 (1994) (Neely, J.)

See NEW TRIAL Newly discovered evidence, Sufficient for new trial, (p. 486) for discussion of topic.

### Paternity

#### Blood tests

***Mildred L.M. v. John O.F.***, 452 S.E.2d 436 (1994) (Cleckley, J.)

See PATERNITY Blood tests, When conclusive, (p. 492) for discussion of topic.

### Presence at crime scene

#### Effect of

***State v. Deem***, 456 S.E.2d 22 (1995) (Per Curiam)

Appellant was convicted of aiding and abetting an assault. Appellant and several others were in a car taking one of their number home when words were exchanged with a group standing near an intersection. The two groups armed themselves and two of them exchanged blows; it was undisputed that appellant did not strike the victim, nor say anything to either the assailant or the victim prior to the blows. Further, he left the group prior to the altercation but returned prior to the blows being struck.

Appellant claimed he armed himself only because he saw golf clubs in the victim's group; a defense witness corroborated the presence of the clubs. Appellant claimed he originally denied having the club because he believed himself to be only a witness. On appeal, he claimed the evidence was insufficient to convict.

**SUFFICIENCY OF EVIDENCE**

**Presence at crime scene** (continued)

**Effect of** (continued)

***State v. Deem***, (continued)

Syl. pt. 1 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syl. Pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 2 - "Where a defendant is convicted of a particular substantive offense, the test of the sufficiency of the evidence to support the conviction necessarily involves consideration of the traditional distinctions between parties to offenses. Thus, a person may be convicted of a crime so long as the evidence demonstrates that he acted as an accessory before the fact, as a principal in the second-degree, or as a principal in the first-degree in the commission of such offense." Syl. Pt. 8, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989).

Syl. pt. 3 - " ' " 'Merely witnessing a crime, without intervention, does not make a person a party to its commission unless his interference was a duty, and his non-interference was one of the conditions of the commission of the crime; or unless his non-interference was designed by him and operated as an encouragement to or protection of the perpetrator.' Syllabus, *State v. Patterson*, 109 W.Va. 588, 155 S.E. 661 [1930]." Syllabus Point 3, *State v. Haines*, 156 W.Va. 281, 192 S.E.2d 879 (1972).' Syl. Pt. 9, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989)." Syl. Pt. 3, *State v. Kirkland*, 191 W.Va. 586, 447 S.E.2d 278 (1994).

Syl. pt. 4 - " 'Proof that the defendant was present at the time and place the crime was committed is a factor to be considered by the jury in determining guilt, along with other circumstances, such as the defendant's association with or relation to the perpetrator and his conduct before and after the commission of the crime." Syl. Pt. 10, *State v. Fortner*, 182 W.Va. 345, 387 S.E.2d 812 (1989)." Syl. Pt. 4, *State v. Kirkland*, 191 W.Va. 586, 447 S.E.2d 278 (1994).

**SUFFICIENCY OF EVIDENCE**

**Presence at crime scene** (continued)

**Effect of** (continued)

***State v. Deem***, (continued)

Here, appellant associated himself with the enterprise. He armed himself and remained with the group even after it was clear that some sort of violence would occur. Although appellant may not have intended an assault, his actions made an assault more likely. Appellant was clearly more than just a bystander. Viewing the evidence favorably for the prosecution, evidence sufficient. No error.

**Sexual assault**

**Forcible compulsion**

***State v. Hottinger***, 461 S.E.2d 462 (1995) (Per Curiam)

Appellant was convicted of sexual assault in the second and third degrees. On appeal he claimed the evidence was insufficient to show forcible compulsion. The prosecution stipulated that appellant did not force the victim (who was fifteen years old) to have sex. The victim's mother's boyfriend forced the act.

Syl. pt. 4 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syl. Pt. 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978)."

Viewing the evidence most favorably for the prosecution the Court found the jury could have found that appellant knew the victim was being forced. No error.

## SUFFICIENCY OF EVIDENCE

### Sexual attacks

***State ex rel. Morgan v. Trent***, 465 S.E.2d 257 (1995) (Miller, J.)
(consolidated) ***Dean v. Duncil***, 465 S.E.2d 257 (1995) (Miller, J.)

See SEXUAL ATTACKS Sexual assault, Victim's age, (p. 643) for discussion of topic.

### Termination of parental rights

***State v. Jessica M.***, 445 S.E.2d 243 (1994) (Per Curiam)

See TERMINATION OF PARENTAL RIGHTS Abuse and neglect, Sufficiency to terminate, (p. 675) for discussion of topic.

### To support verdict

***Mildred L.M. v. John O.F.***, 452 S.E.2d 436 (1994) (Cleckley, J.)

See PATERNITY Blood tests, When conclusive, (p. 492) for discussion of topic.

**SUMMARY JUDGMENT**

**Appropriateness of**

***Gentry v. Mangum***, 466 S.E.2d 171 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Scientific evidence, (p. 250) for discussion of topic.

## SUPPORT

### Child support enforcement under RURESA

***State ex rel. Cline v. Pentasuglia***, 457 S.E.2d 644 (1995) (Workman, J.)

See PATERNITY Determination of, Pursuant to RURESA, (p. 497) for discussion of topic.

## TERMINATION OF PARENTAL RIGHTS

### Abandonment

***In the Matter of Brian D. v. Nanny***, 461 S.E.2d 129 (1995) (Workman, J.)

See ABUSE AND NEGLECT Improvement period, Case plan required, (p. 6) for discussion of topic.

### Abuse and neglect

#### Sufficiency to terminate

***State v. Jessica M.***, 445 S.E.2d 243 (1994) (Per Curiam)

Appellants, represented by *guardians ad litem*, requested reversal of a circuit court order allowing their mother a six-month improvement period in lieu of termination of parental rights. Another child died in the home of blunt force trauma. A credible explanation of the injuries was never given. The two other children suffered similar unexplained injuries.

The Court noted the standard must be what is required for the best interests of the child. *Snyder v. Scheerer*, 190 W.Va. 64, 436 S.E.2d 299 (1993); *In re Jeffrey L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993); *David M. v. Margaret M.*, 182 W.Va. 57, 385 S.E.2d 912 (1989); *In the Interest of Darla B.*, 175 W.Va. 137, 331 S.E.2d 868 (1985). The Court ordered the Department of Health and Human Resources to conduct a thorough investigation and home study. *W.Va. Code* § 49-6A-9; *John D.K. v. Polly A.S.*, 190 W.Va. 254, 438 S.E.2d 46 (1993). A hearing was set to consider the results of the study; physical custody to remain with the maternal grandparents, legal custody with DHHR until the hearing.

This case originally resulted in an order by the Court to the Department of Health and Human Resources to conduct further investigation following the death of Angela E. (See facts, elsewhere this topic). The DHHR concluded that the maternal grandparents with whom the children were placed provided a caring and loving environment. The mother, however, continues to minimize her dead husband's involvement with abuse. DHHR believes it in the childrens' interests to terminate the mother's parental rights and place custody with DHHR.

**Abuse and neglect** (continued)

**Sufficiency to terminate** (continued)

***State v. Jessica M.***, (continued)

Syl. pt. 1 - "Though constitutionally protected, the right of the natural parent to the custody of minor children is not absolute and it may be limited or terminated by the State, as *parens patriae*, if the parent is proved unfit to be entrusted with child care." Syl. pt. 5, *In re Willis*, 157 W.Va. 225, 207 S.E.2d 129 (1973).

Syl. pt. 2 - "Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." Syl. pt. 3, *In re Jeffrey R. L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

The Court found troubling the mother's failure to protect her children at the time of abuse and her refusal to acknowledge the abuse now. However, the Court was unsure what the final disposition should be and ordered another study by DHHR; legal custody to remain with DHHR and physical custody with the grandparents; liberal visitation to be allowed the mother. Remanded.

***In re Jonathan Michael D.***, 459 S.E.2d 131 (1995) (Per Curiam)

Appellant's parental rights were terminated pursuant to allegations made under *W.Va. Code* § 49-6-1, abuse and neglect. Following three hearings the circuit court ruled that abuse was present. After a twelve month improvement period, with an intermediate review, the court terminated appellant's parental rights.

A counselor testified that the father had impulse control problems and was depressed. The father denied hitting his son but admitted to being abused himself. Both he and the mother gave various reasons for the child's substantial injuries. The mother claimed to have filed for divorce because she was not sure her son was safe.

## TERMINATION OF PARENTAL RIGHTS

**Abuse and neglect** (continued)

**Sufficiency to terminate** (continued)

***In re Jonathan Michael D.***, (continued)

The child's foster mother testified that the mother told her the couple were to reunite after they told DHHR what they wanted to hear. Several physicians testified to the child's injuries and a DHHR worker recommended termination of parental rights.

Syl. pt. 1 - " '*W.Va. Code*, 49-1-3(a) (1984), in part, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent.' Syl. pt. 3, *In re Betty J.W.*, 179 W.Va. 605, 371 S.E.2d 326 (1988)." Syllabus Point 2, *In re Jeffrey R.L.*, 190 W.Va. 224, 435 S.E.2d 162 (1993).

Syl. pt. 2 - "At the conclusion of the improvement period, the court shall review the performance of the parents in attempting to attain the goals of the improvement period and shall, in the court's discretion, determine whether the conditions of the improvement period have been satisfied and whether sufficient improvement has been made in the context of all the circumstances of the case to justify the return of the child." Syllabus Point 6, *In the Interest of Carlita B.*, 185 W.Va. 613, 408 S.E.2d 365 (1991).

Despite the need for monitoring at a one-month interval (see *Carlita B.*, *supra*), the Court noted that the standard of review was whether the circuit court was clearly erroneous. No error here.

**Adoption following**

***Alonzo v. Jacqueline F.***, 445 S.E.2d 189 (1994) (Miller, J.)

See ABUSE AND NEGLECT Adoption after filing of charges, (p. 1) for discussion of topic.

## TERMINATION OF PARENTAL RIGHTS

### Fit caretaker defined

***Dancy v. Dancy***, 447 S.E.2d 883 (1994) (Per Curiam)

See CHILD CUSTODY Fit caretaker defined, (p. 138) for discussion of topic.

### Guardians for children

***In the Matter of Brian D. v. Nanny***, 461 S.E.2d 129 (1995) (Workman, J.)

See ABUSE AND NEGLECT Improvement period, Case plan required, (p. 6) for discussion of topic.

### Guardian required

***In the Matter of Lindsey C.***, 473 S.E.2d 110 (1995) (Albright, J.)

Appellant was committed to a mental hospital and released following the birth of the infant at issue here. The discharge order noted that appellant's condition was controllable by medication but was complicated by non-compliance with after care treatment and the stress of a newborn child Appellant was later hospitalized again and subsequently filed a domestic violence petition against her husband. She was awarded temporary custody of the child.

Following a DHHR referral regarding suspected neglect, appellant was once more hospitalized. Although the father took care of the child, no orders regarding custody were entered. DHHR was satisfied with his care and ceased visitations. While hospitalized appellant alleged that the father sexually abused the child but DHHR found the allegations groundless. However, the father was later found drunk and unconscious with the child in his custody and DHHR took emergency custody, alleging, inter alia, abandonment by appellant and seeking to terminate both parents' rights. Appellant was apparently not present, nor was her location known.

**Guardian required** (continued)

***In the Matter of Lindsey C.***, (continued)

Notice of the DHHR petition was sent certified mail to appellant's mother, appellant's last known address; it was then sent to the last marital home and ultimately returned to the circuit clerk marked "moved, left no address, return to sender." A home study was ordered of the maternal grandmother's home as a placement alternative. A subsequent order reflects that appellant's whereabouts were known but no action was taken to serve her or to appoint counsel for her. Meanwhile, appellant was committed once again, this time in Minnesota.

Another home study was done, this time of the father's sister and brother-in-law. The court file also contained a notation that receipt of service was acknowledged by the mental institution; appellant claimed she never got notice. At a subsequent hearing, at which appellant was absent, the court appointed the father's sister and brother-in-law guardians of the child; it also found that appellant abandoned and neglected the child and that appellant was then unwilling or unable to provide for the child. The court went on to note that appellant had received actual notice, that neither the father or mother could care for the child, and that DHHR's efforts were in vain. The child was delivered to her new home.

Although appellant was recommitted in Minnesota, at a subsequent hearing in West Virginia a social worker informed the court that appellant had made inquires about the child. The child's *guardian ad litem* asked the court to appoint a *guardian ad litem* for appellant. Appellant did not appear at a final hearing from which this appeal is taken. Counsel was not appointed for her. Following the court's order directing that DHHR prepare a permanent placement plan, the court received notice from a new DHHR worker who was told by a director of appellant's Minnesota group home that appellant had never received notice to seek legal counsel. A subsequent hearing, at which she was yet again not present, enjoined appellant from interfering with the new guardians.

**Guardian required** (continued)

***In the Matter of Lindsey C.***, (continued)

Appointed counsel in Minnesota thereupon advised the court that neither he nor appellant were given notice of the West Virginia proceedings and that appellant was again committed involuntarily. Minnesota counsel requested that West Virginia counsel be appointed. Appellant was later released from Minnesota custody and took this appeal.

Syl. pt. 1 - Any failure by litigants to observe carefully the requirements of our appellate rules is expressly disapproved; in appropriate circumstances an appeal may be dismissed by reason of a disregard of those rules.

Syl. pt. 2 - The procedure in abuse and neglect cases is governed by provisions internal to *W.Va. Code* § 49-1-1, *et seq.*, and such other procedural requirements of the Code or general law as obtain. Except for Rules 5(b), 5(e) and 80, the *West Virginia Rules of Civil Procedure for Trial Courts of Record* are not applicable to such cases.

Syl. pt. 3 - In abuse and neglect proceedings the appointment of a *guardian ad litem* is required for adult respondents who are involuntarily hospitalized for mental illness, whether or not such adult respondents have also been adjudicated incompetent.

Syl. pt. 4 - It is error to enter a decree terminating parental rights after a suggestion of involuntary hospitalization for mental illness of the affected parent or custodian without first having appointed a *guardian ad litem* for such parent or custodian.

Syl. pt. 5 - A parent or custodian named in an abuse and neglect petition who is involuntarily hospitalized for mental illness but who retains all of his or her civil rights, must be effectively served with process, including, if service is personal or by mail, service of a copy of any petition or other pleading upon which an order terminating parental rights may be based.

**Guardian required** (continued)

***In the Matter of Lindsey C.***, (continued)

Syl. pt. 6 - In abuse and neglect cases, service of original process on a *guardian ad litem* appointed for a parent or custodian involuntarily hospitalized for mental illness whose legal capacity has not been terminated by law cannot be substituted in lieu of service on the hospitalized parent or custodian where the parental rights of such person may be terminated under the process to be served.

Syl. pt. 7 - "In child neglect proceedings which may result in the termination of parental rights to the custody of natural children, indigent parents are entitled to the assistance of counsel because of the requirements of the Due Process clauses of the *West Virginia and United States Constitutions*." Syllabus point 1, *State ex rel. LeMaster v. Oakley*, 157 W.Va. 590, 203 S.E.2d 140 (1974).

Syl. pt. 8 - Circuit courts should appoint counsel for parents and custodians required to be named as respondents in abuse and neglect proceedings *incident of the making of the order filing each abuse and neglect petition*. Upon the appearance of such persons before the court, evidence should be promptly taken, by affidavit and otherwise, to ascertain whether the parties for whom counsel has been appointed are or are not able to pay for counsel. In those cases in which the evidence rebuts the presumption of inability to pay as to one or more of the parents or custodians, the appointment of counsel for any such party should be promptly terminated upon the substitution of other counsel or the knowing, intelligent waiver of the right to counsel. Counsel appointed in these circumstances are entitled to compensation as permitted by law.

Syl. pt. 9 - If the appointment of a *guardian ad litem* is required for a parent or custodian, the trial court may also provide in its order appointing counsel or in a later order, a direction that the appointment imposes on that counsel the additional status of *guardian ad litem*, with the attendant duties of protecting the interests of the persons for whom such counsel is appointed *guardian ad litem* and the attendant duty on the court to see to the protection of such person's interests until and unless it later appears that such person's circumstances do not require the continued protection of a *guardian ad litem* or that the two functions cannot be performed by the same attorney.

## TERMINATION OF PARENTAL RIGHTS

**Guardian required** (continued)

***In the Matter of Lindsey C.***, (continued)

The Court sternly disapproved of appellant's counsel's failure to serve opposing counsel with the petition for appeal or to order transcripts. However, the *Rules of Civil Procedure* are inapplicable here; only *W.Va. Code* § 49-1-1 *et seq*. are implicated.

The Court noted appellant never signed any acknowledgment of receipt of service. Declining to reach the issue of whether actual notice would have cured the defect the Court found that failure to appoint counsel for appellant and failure to give adequate notice required reversal. Going further, the Court required that each order filing an abuse and neglect petition must have appointment of counsel as part of that order. Reversed and remanded.

**Involuntarily committed parent**

**Service required**

***In the Matter of Lindsey C.***, 473 S.E.2d 110 (1995) (Albright, J.)

See TERMINATION OF PARENTAL RIGHTS Guardian required, (p. 678) for discussion of topic.

**Involuntary commitment insufficient for**

***In the Matter of Lindsey C.***, 473 S.E.2d 110 (1995) (Albright, J.)

See TERMINATION OF PARENTAL RIGHTS Guardian required, (p. 678) for discussion of topic.

## TERMINATION OF PARENTAL RIGHTS

### Least restrictive alternative not required

***In re Brianna Elizabeth M.***, 452 S.E.2d 454 (1994) (Per Curiam)

DHHR alleged in January, 1992 that the parents of the three children herein had intentionally abused their youngest child, or knowingly allowed abuse, and requested that their parental rights be terminated. Brianna, the youngest, suffered permanent brain damage as a result of her mother's abuse.

The circuit court removed all three children from the home and subsequently terminated the mother's parental rights but allowed the father a one-year improvement period based upon his expressed intention to divorce. The father failed to continue in required counseling sessions, did not acknowledge his wife's abuse and did not sever ties with her. This petition sought termination of his parental rights.

Syl. pt. 1 - " 'Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va. Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected.' Syllabus Point 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980)." Syl. Pt. 4, *In re Jonathan P.*, 182 W.Va. 302, 387 S.E.2d 537 (1989).

Syl. pt. 2 - " '*W.Va. Code*, 49-1-3(a) (1984), *in part*, defines an abused child to include one whose parent knowingly allows another person to commit the abuse. Under this standard, termination of parental rights is usually upheld only where the parent takes no action in the face of knowledge of the abuse or actually aids or protects the abusing parent.' Syl. pt. 3 *In re Betty J. W.*, 179 W.Va. 605, 371 S.E.2d 326 (1988)." Syl. Pt. 2, *In re Jeffrey R. L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

Syl. pt. 3 - "Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." Syl. Pt. 3, *In re Jeffrey R. L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

**Least restrictive alternative not required** (continued)

***In re Brianna Elizabeth M.***, (continued)

Syl. pt. 4 - "Termination of parental rights of a parent of an abused child is authorized under *W.Va. Code*, 49-6-1 to 49-6-10, as amended, where such parent contends nonparticipation in the acts giving rise to the termination petition but there is clear and convincing evidence that such nonparticipating parent knowingly took no action to prevent or stop such acts to protect the child. Furthermore, termination of parental rights of a parent of an abused child is authorized under *W.Va. Code*, 49-6-1 to 49-6-10, as amended, where such nonparticipating parent supports the other parent's version as to how a child's injuries occurred, but there is clear and convincing evidence that such version is inconsistent with the medical evidence." Syl. Pt. 2, *In re Scottie D.*, 185 W.Va. 191, 406 S.E.2d 214 (1991).

The Court noted public policy to keep marriages intact must be subservient to the right of children to be free from abuse; legal custody to remain with DHHR, physical custody with the paternal grandparents, with review in one year to determine permanent placement.

***In re Danielle T***, 466 S.E.2d 189 (1995) (Per Curiam)

Appellant Department of Health and Human Resources sought termination of appellee's parental rights. Appellees are the natural parents. Upon treatment at hospital on 16 February 1994, their child was found to be emaciated, in shock, had pneumonia, scratches and scars on her back, bruises about the head, four missing teeth, missing patches of hair, a cut on one ear, burns on the inside of both arms, severe dehydration and severe malnutrition. She had previously had a dislocated hip, for which surgery was required.

DHHR sought immediate custody on 17 February 1994. The circuit court ordered temporary custody pursuant to *W.Va. Code*, 49-6-3(a) and appointed counsel for the child and the parents. Following several hearings, during which time the child was placed out of the home, on 23 May 1995 the court found the parents were not intentionally abusive and ordered the child returned, subject to an improvement period and supervision. Both appellant and the child's *guardian ad litem* objected.

**Least restrictive alternative not required** (continued)

***In re Danielle T***, (continued)

Syl. pt. 1 - "Termination of parental rights, the most drastic remedy under the statutory provision covering the disposition of neglected children, *W.Va. Code*, 49-6-5 [1977] may be employed without the use of intervening less restrictive alternatives when it is found that there is no reasonable likelihood under *W.Va. Code*, 49-6-5(b) [1977] that conditions of neglect or abuse can be substantially corrected." Syl. pt. 2, *In re R.J.M.*, 164 W.Va. 496, 266 S.E.2d 114 (1980).

Syl. pt. 2 - "Parental rights may be terminated where there is clear and convincing evidence that the infant child has suffered extensive physical abuse while in the custody of his or her parents, and there is no reasonable likelihood that the conditions of abuse can be substantially corrected because the perpetrator of the abuse has not been identified and the parents, even in the face of knowledge of the abuse, have taken no action to identify the abuser." Syl. pt. 3, *In re Jeffrey R.L.*, 190 W.Va. 24, 435 S.E.2d 162 (1993).

The Court noted appellees' explanations of the abuse were contradicted by medical testimony. Although some testimony was given by a psychologist that the mother was not prone to abuse, even the deputy sheriff who thought no abuse took place admitted the child was neglected.

The Court found the abuse was likely to recur and that conditions causing the abuse are unlikely to be corrected. Parental rights terminated. Remanded for development of a placement plan; appointment of *guardian ad litem* continued.

**Right to counsel**

***In the Matter of Lindsey C.***, 473 S.E.2d 110 (1995) (Albright, J.)

See TERMINATION OF PARENTAL RIGHTS Guardian required, (p. 678) for discussion of topic.

## TERMINATION OF PARENTAL RIGHTS

### Standard for

***In re Brianna Elizabeth M.***, 452 S.E.2d 454 (1994) (Per Curiam)

See TERMINATION OF PARENTAL RIGHTS Least restrictive alternative not required, (p. 683) for discussion of topic.

### Standard of proof

***In re Jonathan Michael D.***, 459 S.E.2d 131 (1995) (Per Curiam)

See TERMINATION OF PARENTAL RIGHTS Abuse and neglect, Sufficiency to terminate, (p. 676) for discussion of topic.

### Visitation with parent or siblings

***In the Matter of Brian D. v. Nanny***, 461 S.E.2d 129 (1995) (Workman, J.)

See ABUSE AND NEGLECT Improvement period, Case plan required, (p. 6) for discussion of topic.

## THREE TERM RULE

### Interpreted

***State ex rel. Waldron v. Stephens***, 457 S.E.2d 117 (1995) (Per Curiam)

See RIGHT TO SPEEDY TRIAL Standard for determining, (p. 575) for discussion of topic.

**TOBACCO**

**Regulating use of**

***State ex rel. Kincaid v. Parsons***, 447 S.E.2d 543 (1994) (Neely, J.)

See PRISON/JAIL CONDITIONS Tobacco ban, (p. 523) for discussion of topic.

## TRANSCRIPTS

### Audio and video tapes

#### Use of

***State v. Hardesty***, 461 S.E.2d 478 (1995) (Fox, J.)

See EVIDENCE Admissibility, Transcripts of audio or video tapes, (p. 263) for discussion of topic.

### Right to

#### Failure to produce

***State ex rel. Cajero v. Edwards***, No. 22138 (4/18/94) (Per Curiam)

Rule to show cause was issued to compel respondent to produce a transcript of Criminal Action No. 93-F-32, *State v. Cajero*. Petitioner was sentenced 16 August 1993. On 15 September 1993 respondent acknowledged receipt of the request for transcript. Pursuant to Rule 37(b), the transcript should have been completed within 45 days but seven months later was not done.

Quoting *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985) and *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969), the Court found it had authority to supervise court reporters and that a writ of mandamus did lie. Respondent ordered to complete the transcript by 19 May 1994, petitioner to notify the Clerk of the Court if the transcript is not produced, which notice to be deemed motion for a second rule to show cause.

***State ex rel. Elswick v. Lawson***, No. 22790 (4/11/95) (Per Curiam)

Relator was convicted of breaking and entering and petit larceny ; the order of judgment was entered 27 June 1994. Relator filed notice of intent to appeal, including a request for transcript, preparation of which was ordered 2 August 1994.

**TRANSCRIPTS**

**Right to** (continued)

**Failure to produce** (continued)

***State ex rel. Elswick v. Lawson***, (continued)

Respondent characterized the transcript as "in the works" in a letter to respondent announcing her resignation as court reporter for Jackson County but recognizing her responsibility to provide the transcript. She now says she is unable to complete the work. Respondent is a single mother with three children, has taken another job and claims she lacks necessary equipment to prepare transcripts from electronic recordings.

In *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985), Syl. Pt. 3.

> Although subject to the direction and supervision of the circuit judges to whom they are assigned, court reporters, as employees of the Supreme Court of Appeals, whose primary functions consist of recording, transcribing, and certifying records of proceedings for purposes of appellate review, are subject to the ultimate regulation, control, and discipline of the Supreme Court of Appeals.

In Syllabus Point 2 of *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969), we stated:

> A writ of mandamus will not issue unless three elements coexist -- (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

Writ granted. Respondent allowed to deliver tapes to Administrative Director of the Courts in light of her inability to finish the work.

**TRANSCRIPTS**

**Right to** (continued)

**Failure to produce** (continued)

***State ex rel. Garrett v. Lawson***, No. 22264 (6/16/94) (Per Curiam)

Petitioner was sentenced to life without mercy 8 November 1993. Notice of intent to appeal was filed and on 3 December 1993 the circuit court ordered that petitioner be provided with a free transcript; he was represented by appointed counsel at the time.

Respondent became the Court Reporter for Roane county in November 1993. Petitioner discharged his appointed counsel and obtained pro bono counsel; in March, 1994 he received from his former counsel a transcript but when request was made for a transcript of pre-trial proceedings, his new counsel was informed, at the court's direction, that payment must be made. By letter dated 17 May 1994, the court advised the Court that petitioner had retained counsel and should be required to pay.

Citing *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985) and *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969), the Court ordered respondent to produce a transcript on or before 20 July 1994 or be held in contempt. Writ granted.

***State ex rel. Hemingway v. Edwards***, No. 22437 (10/6/94) (Per Curiam)

Petitioner sought writ of mandamus to compel respondent to produce a transcript for the underlying case. Petitioner requested a transcript 24 January 1994; because it was not available, the circuit court granted a two-month extension of her appeal period, which extension expired 25 July 1994. Rule to show cause was issued 28 July 1994, returnable 5 October 1994.

The Court noted that pursuant to Rule 37(b) of the *Rules of Criminal Procedure*, respondent should have completed the transcript within 45 days of receipt of the order to produce. Citing *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985) and *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969), the Court ordered respondent to produce the transcript on or before 10 November 1994. Writ granted.

***State ex rel. Lopez v. Edwards***, No. 22262 (6/15/94) (Per Curiam)

Petitioner was sentenced 29 November 1993 to life without mercy. Notice of intent to appeal was filed and a transcript requested within forty-five days pursuant to Rule 37(b) of the *Rules of Criminal Procedure*. As of 15 June 1995, no transcript was provided.

Citing *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985), and *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969), the Court directed respondent to produce the transcript on or before 20 July 1994 or be held in contempt. Writ granted.

***State ex rel. Nazelrod v. Edwards***, No. 22047 (2/14/94) (Per Curiam)

Petitioner was sentenced 14 June 1993 and filed notice of intent to appeal 22 June 1993. Respondent failed to produce a transcript and a rule to show cause was issued 8 December 1993, returnable 8 February 1994. Respondent filed a response 7 February 1994.

The Court found respondent had not completed the transcript within 45 days of receipt of the order to produce it, as required by Rule 37(b) of the *Rules of Criminal Procedure*.

The Court noted its right to control court reporters, *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985), and that a writ of mandamus would lie, *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969). Respondent was directed to produce a transcript by 14 March 1994.

**TRANSCRIPTS**

**Right to** (continued)

**Failure to produce** (continued)

***State ex rel. Shane v. Edwards***, No. 22483 (10/6/94) (Per Curiam)

Petitioner sought writ of mandamus to compel respondent to produce a transcript for the underlying case. Petitioner requested a transcript 24 January 1994; because it was not available, the circuit court granted a two-month extension of her appeal period, which extension expired 25 July 1994. Rule to show cause was issued 28 July 1994, returnable 5 October 1994.

The Court noted that pursuant to Rule 37(b) of the *Rules of Criminal Procedure*, respondent should have completed the transcript within 45 days of receipt of the order to produce. Citing *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985) and *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969), the Court ordered respondent to produce the transcript on or before 10 November 1994. Writ granted.

***State ex rel. Taylor v. Edwards***, No. 22841 (6/7/95) (Per Curiam)

Petitioner was convicted of kidnaping, second-degree sexual assault and aggravated robbery and sentenced 20 December 1993. On 24 January 1994 he filed notice of intent to appeal and requested a transcript. As of 29 September 1994 only part of the transcript was completed.

In *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985), Syl. Pt. 3.

> Although subject to the direction and supervision of the circuit judges to whom they are assigned, court reporters, as employees of the Supreme Court of Appeals, whose primary functions consist of recording, transcribing, and certifying records of proceedings for purposes of appellate review, are subject to the ultimate regulation, control, and discipline of the Supreme Court of Appeals.

In Syllabus Point 2 of *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969), we stated:

**TRANSCRIPTS**

**Right to** (continued)

**Failure to produce** (continued)

***State ex rel. Taylor v. Edwards***, (continued)

> A writ of mandamus will not issue unless three elements coexist -- (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

Respondent ordered to produce full transcript by 10 July 1995.

***State ex rel. Valentine v. Lawson***, No. 22780 (4/11/95) (Per Curiam)

Relator was convicted of multiple felonies; he contended he orally requested transcripts at this sentencing hearing and made written request in his notice of intent to appeal. He admits receiving transcript of the plea and sentencing hearings but alleged other proceedings are missing.

Respondent resigned as a salaried court reporter 1 October 1994 because she cannot keep up with the travel and work load; respondent is a single mother of three children. She alleged she is unable to produce transcripts because of accepting a full-time job. The circuit judge has not hired a new reporter. Further, she alleged that some of the proceedings were recorded electronically and she does not have necessary equipment with which to produce transcripts.

In *Mayle v. Ferguson*, 174 W.Va. 430, 327 S.E.2d 409 (1985), Syl. pt. 3.

> Although subject to the direction and supervision of the circuit judges to whom they are assigned, court reporters, as employees of the Supreme Court of Appeals, whose primary functions consist of recording, transcribing, and certifying records of proceedings for purposes of appellate review, are subject to the ultimate regulation, control, and discipline of the Supreme Court of Appeals.

**TRANSCRIPTS**

**Right to** (continued)

**Failure to produce** (continued)

***State ex rel. Valentine v. Lawson***, (continued)

In Syllabus Point 2 of *State ex rel. Kucera v. City of Wheeling*, 153 W.Va. 538, 170 S.E.2d 367 (1969), we stated:

> A writ of mandamus will not issue unless three elements coexist -- (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy.

Respondent was ordered to produce the transcripts by May 15, 1995 or to deliver her notes, tapes, etc. to the Administrative Director of the Courts if she is unable to finish the work; and to notify the Clerk of the Court when the work was done or delivery made.

**TRIAL**

**Prosecuting attorney's comments**

***State v. Sugg***, 456 S.E.2d 469 (1995) (Cleckley, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 549) for discussion of topic.

**Right to speedy trial**

***State ex rel. Waldron v. Stephens***, 457 S.E.2d 117 (1995) (Per Curiam)

See RIGHT TO SPEEDY TRIAL Standard for determining, (p. 575) for discussion of topic.

**Speedy trial**

**Right to**

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See RIGHT TO SPEEDY TRIAL Generally, (p. 574) for discussion of topic.

## VENUE

### Change of venue

#### Authority for

***State ex rel. Riffle v. Ranson***, 464 S.E.2d 763 (1995) (Cleckley, J.)

(Note: while not a criminal matter, this case is included for its general applicability to change of venue.)

The plaintiff below filed suit in the circuit court of Kanawha County, alleging sexual harassment in relation to her job at the William R. Sharpe, Jr. Hospital in Lewis County. Two employees of the hospital were named as defendants, along with the Secretary of DHHR and a private health care corporation.

Defendants moved to transfer the case to Lewis County pursuant to *W.Va. Code* § 56-9-1 and the doctrine of *forum non conveniens*, arguing that the plaintiff, the place of employment and most of the witnesses resided in Lewis County. Plaintiffs argued that Kanawha County was appropriate because one of the defendants resides in Kanawha County, it was their choice as to where to file and the plaintiff preferred Kanawha County because of the sensitive nature of the allegations. The circuit court ruled that the case should be in Lewis County because it was "the most convenient and the most appropriate forum..." Defendants brought request for writ of prohibition.

Syl. pt. - *W.Va. Code*, 56-1-(b) (1986), is the exclusive authority for a discretionary transfer or change of venue and any other transfer or change of venue from one county to another within West Virginia that is not explicitly permitted by the statute is impermissible and forbidden.

The Court found the Legislature deliberately limited the doctrine of *forum non conveniens*. Since *W.Va. Code* § 56-1-1(b) did not permit transfer for the reasons articulated, writ was granted.

**Change of venue** (continued)

**Sufficiency of proof for**

***State v. Derr***, 451 S.E.2d 731 (1994) (Cleckley, J.)

Appellant was convicted of first-degree murder, malicious assault and first-degree sexual assault, all sentences to run consecutively. Due to the heinous nature of the crimes (two minors were allegedly raped, with one later murdered), the case received extensive publicity. Headlines tied appellant's name to the crimes.

Appellant moved for change of venue based on: (1) pretrial publicity; (2) widespread bias and prejudice against him; and (3) hostile sentiment that prevented a fair trial. Counsel submitted forty affidavits and numerous newspaper articles; he stated that only two people he spoke with could not remember the facts of the case or had no opinion about the case. He asserted that a number of the affidavits indicated appellant could not receive a fair trial, although he conceded that pre-trial publicity had died down.

The prosecuting attorney submitted 112 affidavits against a change of venue. 108 of the 112 answered that they did not know any reason that appellant could not receive a fair trial by a jury composed of citizens of Marshall County. 80 of the affidavits said they did not believe a hostile sentiment existed as to appellant.

On *voir dire*, each prospective juror admitting reading or hearing about the case. The trial court denied counsel's motion for *in camera voir dire* individually or in groups but the court did ask the entire panel about their knowledge of the case. Upon an affirmative answer, the court inquired as to whether they had formed an opinion as to guilt or innocence. Only one prospective juror replied affirmatively. She was struck and her replacement was similarly questioned. Several times the court again asked a series of questions relating to whether the jurors could disregard publicity and render a fair verdict free of bias, to all of which there was no response.

Following the court's admonition that any juror knowing of any reason he or she should not be a juror should tell the court, defense counsel was given the opportunity to ask questions. Counsel did not renew his request for individual *voir dire*.

***State v. Derr***, (continued)

Syl. pt. 1 - " 'To warrant a change of venue in a criminal case, there must be a showing of good cause therefor, the burden of which rests on the defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered rests in the sound discretion of the trial court; and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused.' Point 2, Syllabus *State v. Wooldridge*, 129 W.Va. 448, 40 S.E.2d 899 (1946)." Syllabus Point 1, *State v. Sette*, 161 W.Va. 384, 242 S.E.2d 464 (1978).

Syl. pt. 2 - " 'A present hostile sentiment against an accused, extending throughout the entire county in which he is brought to trial, is good cause for removing the case to another county.' Point 2, Syllabus, *State v. Dandy*, 151 W.Va. 547, 153 S.E.2d 507 (1967), *quoting* Point 1, Syllabus, *State v. Siers*, 103 W.Va. 30, 136 S.E. 503 (1927)." Syllabus Point 2, *State v. Sette*, 161 W.Va. 384, 242 S.E.2d 464 (1978).

Syl. pt. 3 - One of the inquires on a motion for a change of venue should not be whether the community remembered or heard the facts of the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt or innocence of the defendant.

Syl. pt. 4 - "The right to a trial by an impartial, objective jury in a criminal case is a fundamental right guaranteed by the Sixth and Fourteenth Amendments of the *United States Constitution* and Article III, Section 14 of the *West Virginia Constitution*. A meaningful and effective *voir dire* of the jury panel is necessary to effectuate that fundamental right." Syllabus Point 4, *State v. Peacher*, 167 W.Va. 540, 280 S.E.2d 559 (1981).

***State v. Derr***, (continued)

Syl. pt. 5 - " 'In a criminal case, the inquiry made of a jury on its *voir dire* is within the sound discretion of the trial court and not subject to review, except when the discretion is clearly abused.' Syl. pt. 2, *State v. Beacraft*, 126 W.Va. 895, 30 S.E.2d 541 (1944)." Syllabus Point 2, *State v. Mayle*, 178 W.Va. 26, 357 S.E.2d 219 (1987).

The Court noted review here was only of abuse of discretion. The trial court's finding will only be overturned for "manifest error." *Patton v. Yount*, 467 U.S. 1025, 1031-32, 104 S.Ct. 2885, 2889, 81 L.Ed.2d 847, 854 (1984).

The Court found sufficient reason in the prosecuting attorney's affidavits to support a finding that venue should not be changed. Although *voir dire* did result in jurors' admitting knowledge of the case, mere knowledge alone is insufficient to require disqualification or change of venue. A community sentiment must appear beyond mere indifference of jurors. *Murphy v. Florida*, 421 U.S. 794 at 803, 95 S.Ct. 2031 at 2038, 44 L.Ed.2d 589 at 596 (1975).

As to the jury's impartiality, the Court noted the test of juror qualification is whether a juror can disregard prior opinions and base the verdict solely on the evidence and the court's instructions. *State v. Harshbarger*, 170 W.Va. 401, 294 S.E.2d 254 (1982). The Court found the trial court had made significantly more effort than what occurred in *State v. Walker*, 188 W.Va. 661, 425 S.E.2d 616 (1992). No error.

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

Appellant was convicted of first-degree murder in a bludgeoning death. The trial court refused his request for a change in venue.

**VENUE**

**Change of venue** (continued)

**Sufficiency of proof for** (continued)

***State v. Satterfield***, (continued)

Syl. pt. 6 - " ' "To warrant a change of venue in a criminal case, there must be a showing of good cause therefor, the burden of which rests on the defendant, the only person who, in any such case, is entitled to a change of venue. The good cause aforesaid must exist at the time application for a change of venue is made. Whether, on the showing made, a change of venue will be ordered, rests in the sound discretion of the trial court; and its ruling thereon will not be disturbed, unless it clearly appears that the discretion aforesaid has been abused." Point 2, Syllabus, *State v. Wooldridge*, 129 W.Va. 448, 40 S.E.2d 899 (1946).' Syllabus Point 1, *State v. Sette*, 161 W.Va. 384, 242 S.E.2d 464 (1978)." Syl. pt. 1, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

Syl. pt. 7 - " ' "A present hostile sentiment against an accused, extending throughout the entire county in which he is brought to trial, is good cause for removing the case to another county." Point 2, Syllabus, *State v. Dandy*, 151 W.Va. 547, 153 S.E.2d 507 (1967), *quoting* Point 1, Syllabus, *State v. Siers*, 103 W.Va. 30, 136 S.E.2d 503 (1927).' Syllabus Point 2, *State v. Sette*, 161 W.Va. 384, 242 S.E.2d 464 (1978)." Syl. pt. 2, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

Syl. pt. 8 - "One of the inquiries on a motion for a change of venue should not be whether the community remembered or heard the facts of the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt or innocence of the defendant." Syl. pt. 3, *State v. Derr*, 192 W.Va. 165, 451 S.E.2d 731 (1994).

The trial court conducted individual *voir dire* of each prospective juror over four days. Although most had heard of the case, few could remember any details. All who indicated they could not render an impartial verdict were dismissed. No abuse of discretion in refusing to change venue.

**VERDICT**

**Sufficiency of evidence to support**

***Mildred L.M. v. John O.F.***, 452 S.E.2d 436 (1994) (Cleckley, J.)

See PATERNITY Blood tests, When conclusive, (p. 492) for discussion of topic.

*VOIR DIRE*

**Extent of**

**Abuse of discretion**

***Michael v. Sabado***, 453 S.E.2d 419 (1994) (Cleckley, J.)

See JURY *Voir dire*, (p. 433) for discussion of topic.

**Following view of crime scene**

***State v. Linkous***, 460 S.E.2d 288 (1995) (Per Curiam)

See JURY Prejudicing, Juror viewed scene, (p. 431) for discussion of topic.

**Sufficiency of**

**Discretion of judge**

***State v. Derr***, 451 S.E.2d 731 (1994) (Cleckley, J.)

See VENUE Change of venue, Sufficiency of proof for, (p. 698) for discussion of topic.

## WAIVER

### Failure to object

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

See PROSECUTING ATTORNEYS Conduct at trial, Comments during opening or closing argument, (p. 549) for discussion of topic.

## WARRANTS

### Citizen's arrest without warrant

***State v. Farmer***, 454 S.E.2d 378 (1994) (McHugh, J.)

See ARREST Citizen's arrest, (p. 46) for discussion of topic.

### Probable cause for

***State v. Lilly***, 461 S.E.2d 101 (1995) (Fox, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 581) for discussion of topic.

### Search warrant

#### Probable cause determined by magistrate

***State ex rel. Brown v. Dietrick***, 444 S.E.2d 47 (1994) (Miller, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 579) for discussion of topic.

#### Probable cause to issue

***State v. Lilly***, 461 S.E.2d 101 (1995) (Fox, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 581) for discussion of topic.

#### Sufficiency of

***State v. Lilly***, 461 S.E.2d 101 (1995) (Fox, J.)

See SEARCH AND SEIZURE Warrant, Probable cause for, (p. 581) for discussion of topic.

## WELFARE FRAUD

### Lesser included instruction

***State v. Shane***, 465 S.E.2d 640 (1995) (Per Curiam)

See INSTRUCTIONS Lesser included offenses, (p. 385) for discussion of topic.

## WITNESSES

### Bailiff as witness

***State v. Kelley***, 451 S.E.2d 425 (1994) (McHugh, J.)

Appellant was convicted of second-degree murder. The investigating deputy sheriff was allowed to serve as bailiff at the trial, as well as testifying. As bailiff he was required to interact with jurors and with other witnesses. The court was apparently understaffed this deputy was the only one available. The bailiff was instructed to refrain from any contact or conversation with jurors.

Syl. pt. 1 - "A bailiff is an officer of the court to which he or she is assigned, subject to its control and supervision, and responsible for preserving order and decorum, taking charge of the jury, guarding prisoners, and other services which are reasonably necessary for the court's proper functioning." Syl. pt. 2, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).

Syl. pt. 2 - "The bailiff's crucial role in maintaining order in the courtroom requires his or her undivided loyalty and allegiance to the judge whom he or she serves." Syl. pt. 3, *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).

Syl. pt. 3 - A defendant's constitutional rights to due process and trial by a fair and impartial jury, pursuant to amendment VI and amendment XIV, section 1 of the *United States Constitution* and article III, sections 10 and 14 of the *West Virginia Constitution* are violated when a sheriff, in a defendant's trial, serves as a bailiff and testifies as a key witness for the State in that trial.

Syl. pt. 4 - "Errors involving deprivation of constitutional rights will be regarded as harmless only if there is no reasonable possibility that the violation contributed to the conviction." Syl. pt. 20, *State v. Thomas*, 157 W.Va. 640, 203 S.E.2d 445 (1974).

The United States Supreme Court reversed and remanded when two sheriffs were allowed to testify and to serve as jury custodians, *Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965), declaring the arrangement a denial of due process. See also, *Gonzales v. Beto*, 405 U.S. 1052, 92 S.Ct. 1503, 31 L.Ed.2d 787 (1972); brief encounter with bailiff/witness insufficient to contravene due process.

## WITNESSES

### Bailiff as witness (continued)

***State v. Kelley***, (continued)

The Court found the bailiff's role here to be considerably less intrusive than in *Turner*, *supra*; however, Rule 605, *W.Va. Rules of Evidence*, demands that the judge not testify as a witness. The bailiff is undoubtedly the judge's servant. *In re Pauley*, 173 W.Va. 228, 314 S.E.2d 391 (1983).

A judge's law clerk has been held to have the imprimatur of reliability and character of the judge himself. *Kennedy v. Great Atlantic & Pacific Tea Co., Inc.*, 551 F.2d 595 (5th Cir. 1977). Therefore, a bailiff must be said to have the same aura. Violation of due process; the error was not harmless. Reversed and remanded.

### Character

***State v. Wood***, 460 S.E.2d 771 (1995) (McHugh, C.J.)

See EVIDENCE Witnesses, Reputation for truthfulness, (p. 292) for discussion of topic.

### Children

#### Competence of

***State v. Malick***, 457 S.E.2d 482 (1995) (Per Curiam)

See PSYCHOLOGICAL/PSYCHIATRIC EVALUATION Denial of, (p. 558) for discussion of topic.

## WITNESSES

### Co-defendant

***State v. Farmer***, 445 S.E.2d 759 (1994) (Per Curiam)

Appellant was convicted of first-degree murder and kidnaping. At trial, appellant's co-defendant was called as a witness. After being sworn, the co-defendant refused to answer questions, citing the Fifth Amendment. The trial court advised the co-defendant he had no right to do so, disclosing that he had been convicted (presumably of murder, although the opinion does not say) and sentenced to two life terms. Because he persisted in refusing to answer, he was excused and the jury was instructed to disregard his presence.

Following defense counsel's protest, two *in camera* hearings were held which resulted in another jury instruction to disregard any remarks made by the court regarding the co-defendant's criminal convictions.

Syl. pt. 1 - "In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus Point 1, *State v. Starkey*, 161 W.Va. 517, 244 S.E.2d 219 (1978).

Syl. pt. 2 - "In a criminal trial an accomplice may testify as a witness on behalf of the State to having entered a plea of guilty to the crime charged against a defendant where such testimony is not for the purpose of proving the guilt of the defendant and is relevant to the issue of the witness-accomplice's credibility. The failure by a trial judge to give a jury instruction so limiting such testimony is, however, reversible error." Syllabus Point 3, *State v. Caudill*, 170 W.Va. 74, 289 S.E.2d 748 (1982).

The Court found no error, but suggested that prior hearings should be held to determine whether a co-defendant would invoke the Fifth Amendment.

## WITNESSES

### Competency

***State v. Jarrell***, 442 S.E.2d 223 (1994) (Brotherton, J.)

See RIGHT TO CONFRONT Spousal testimony to grand jury, (p. 569) for discussion of topic.

### Credibility of

***State v. Derr***, 451 S.E.2d 731 (1994) (Cleckley, J.)

See INSTRUCTIONS Right to, (p. 389) for discussion of topic.

***State v. Roy***, 460 S.E.2d 277 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Reputation of accused, (p. 249) for discussion of topic.

### Cross-examination

#### Spousal testimony to grand jury

***State v. Jarrell***, 442 S.E.2d 223 (1994) (Brotherton, J.)

See RIGHT TO CONFRONT Spousal testimony to grand jury, (p. 569) for discussion of topic.

### Culpability of

***State v. Kirkland***, 447 S.E.2d 278 (1994) (Workman, J.)

See SUFFICIENCY OF EVIDENCE Generally, (p. 663) for discussion of topic.

## WITNESSES

### Defendant

#### Credibility

***State v. Roy***, 460 S.E.2d 277 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Reputation of accused, (p. 249) for discussion of topic.

### Experts

#### Qualifications for

***State v. Jameson***, 461 S.E.2d 67 (1995) (Per Curiam)

See EVIDENCE Opinion of lay witness, Sufficient foundation for, (p. 284) for discussion of topic.

### Experts' fees

#### Cross-examination on

***State v. Osakalumi***, 461 S.E.2d 504 (1995) (McHugh, C.J.)

Appellant was convicted of first-degree murder. At trial the prosecution cross-examined defense experts as to the fee they were to receive. No objections were raised. On appeal appellant claimed his right to due process was abridged.

Syl. pt. 4 - "To trigger application of the 'plain error' doctrine, there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings." Syl. pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

No error.

## WITNESSES

### Failure to disclose

***State v. Miller***, 466 S.E.2d 507 (1995) (Per Curiam)

See DISCOVERY Failure to disclose, Witnesses, (p. 177) for discussion of topic.

### Hypnotized

#### Use of testimony following

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

Appellant was convicted of murder. At trial two witnesses who were hypnotized to refresh their memory were allowed to testify. As to one, the trial court limited the state to testimony given prior to hypnosis. The other, however, was allowed to testify after hypnosis. The psychologist who hypnotized him testified that he came out of trance whenever questions were asked related to the crime.

The Court refused to adopt a *per-se* rule regarding hypnosis. Generally, however, it noted the prevailing rule is to allow only pre-hypnotic testimony or statements. See *State v. Baker*, 451 S.E.2d 574, 590-91 (N.C. 1994); *State v. Cook*, 605 N.E.2d 70, 77-78 (Ohio 1992); *Hopkins v. Commonwealth*, 337 S.E.2d 264, 270-71 (Va. 1985), *cert. denied sub nom. Hopkins v. Virginia*, 475 U.S. 1098 (1986).

## WITNESSES

### Immunity

#### Testimony following

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See EVIDENCE Admissibility, Immunized witness' testimony, (p. 238) for discussion of topic.

### Intimidation of by police

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See RIGHT TO SPEEDY TRIAL Generally, (p. 574) for discussion of topic.

### Effect of indigency on

***State ex rel. Rojas v. Wilkes***, 455 S.E.2d 575 (1995) (Fox, J.)

See EXPERTS Indigents right to, (p. 296, 297) for discussion of topic.

### Opinion testimony

***State v. Jameson***, 461 S.E.2d 67 (1995) (Per Curiam)

See EVIDENCE Opinion of lay witness, Sufficient foundation for, (p. 284) for discussion of topic.

### Payment of

#### Contingent on favorable testimony

***Committee on Legal Ethics v. Sheatsley***, 452 S.E.2d 75 (1994) (McHugh, J.)

See ATTORNEYS Discipline, Witness' payment contingent on testimony, (p. 104) for discussion of topic.

## WITNESSES

### Reputation for truthfulness

***State v. Wood***, 460 S.E.2d 771 (1995) (McHugh, C.J.)

See EVIDENCE Witnesses, Reputation for truthfulness, (p. 292) for discussion of topic.

### Right to confront

#### Spousal testimony to grand jury

***State v. Jarrell***, 442 S.E.2d 223 (1994) (Brotherton, J.)

See RIGHT TO CONFRONT Spousal testimony to grand jury, (p. 569) for discussion of topic.

### Sequestration

#### Violation of

***State v. Satterfield***, 457 S.E.2d 440 (1995) (McHugh, J.)

Appellant was convicted of first-degree murder. He claimed on appeal that two witnesses were coached simultaneously by the prosecution after they were sequestered. The record showed that the judge was unaware that the prosecution had talked to the witnesses together.

The judge refused to allow any evidence thereby gathered to be introduced and advised the jury that the witnesses were interviewed simultaneously.

Syl. pt. 11 - "Where a State witness violates a sequestration order and is permitted to testify, the question on appeal is whether the witness's violation of the order and the ensuing testimony had a prejudicial effect on the defendant's case." Syl. pt. 4, *State v. Steele*, 178 W.Va. 330, 359 S.E.2d 558 (1987).

The Court found no prejudicial effect. No error.

## WITNESSES

### Spousal immunity

***State v. Jarrell***, 442 S.E.2d 223 (1994) (Brotherton, J.)

See IMMUNITY Spousal testimony, (p. 349) for discussion of topic.

### Spousal testimony

***State v. Jarrell***, 442 S.E.2d 223 (1994) (Brotherton, J.)

See IMMUNITY Spousal testimony, (p. 349) for discussion of topic.

### Testimony

#### Following grant of immunity

***State v. Beard***, 461 S.E.2d 486 (1995) (Workman, J.)

See EVIDENCE Admissibility, Immunized witness' testimony, (p. 238) for discussion of topic.

#### Payment contingent on favorable testimony

***Committee on Legal Ethics v. Sheatsley***, 452 S.E.2d 75 (1994) (McHugh, J.)

See ATTORNEYS Discipline, Witness' payment contingent on testimony, (p. 104) for discussion of topic.

### Unavailability

#### Burden of showing

***State ex rel. Azeez v. Mangum***, 465 S.E.2d 163 (1995) (Workman, J.)

See SIXTH AMENDMENT Right to counsel, Admissibility of extrajudicial statements, (p. 649) for discussion of topic.

**WITNESSES**

**Unavailability** (continued)

**Burden of showing** (continued)

***State v. Mason***, 460 S.E.2d 36 (1995) (Cleckley, J.)

See EVIDENCE Admissibility, Extrajudicial statements, (p. 226) for discussion of topic.

***State v. Shepherd***, 442 S.E.2d 440 (1994) (Per Curiam)

See BURDEN OF PROOF Witness unavailable, (p. 133) for discussion of topic.

**Prosecution's burden**

***State v. Dillon***, 447 S.E.2d 583 (1994) (Workman, J.)

See EVIDENCE Admissibility, Tape recorded statements to informant, (p. 255, 256, 257, 258, 259) for discussion of topic.

**When testimony admissible**

***State v. Woods***, 460 S.E.2d 65 (1995) (Per Curiam)

See EVIDENCE Admissibility, Testimony of unavailable witness, (p. 262) for discussion of topic.

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